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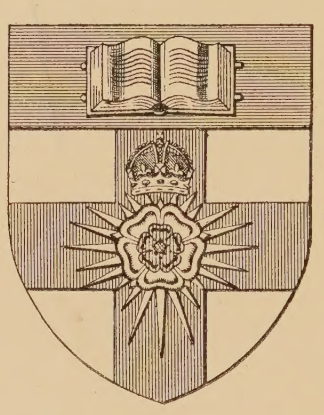

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THE

LAW REPORTS.

Court of Exchequer.

REPORTED BY

JAMES ANSTIE AND ARTHUR CHARLES,

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XXIX VICTORIA.

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1866.

JUDGES

OF

THE COURT OF EXCHEQUER,

XXIX VICTORIA.

The Right Hon. Sir Frederick Pollock, Knt., C.B.
Sir Samuel Martin, Knt.
Sir George William Wilshere Bramwell, Knt.
Sir William Fry Channell, Knt.
Sir Gillery Pigott, Knt.

ATTORNEY GENERAL.

Sir Roundell Palmer, Knt.

SOLICITOR GENERAL.

Sir Robert Porrett Collier, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
25	note (5)	34 L. J. (Ex.) 13 ..	33 L. J. (Ex.) 13.
39	„ (4)	28 L. J. (C.P.) 84 ..	28 L. J. (C.P.) 81.
39	„ (5)	22 L. J. Ch. 84	22 L. J. Ch. 811.
42	„ (2)	4 E. & B. 666	4 E. & B. 669.
45	„ (2)	4 E. & B. 466	4 E. & B. 669.
46	head note 2 & 3 from top	transpose "latter" and	"former."
49	note (1)	Cro. Eliz. 131	Cro. Eliz. 113.
65	head note, bottom line ..	these	there.
67	note (2)	(2) 34 L. J. (C.P.) 125	(1) 34 L. J. (C.P.) 126.
67	„ (3)	(3)	(2)
139	3 from bottom	defendants to the plaintiffs	plaintiffs to the defendants.
142	8 „ „	note	one.
163	11 from top	*Doe* v. *Prideaux* ..	*Roe* v. *Prideaux*.
209	20 „ „	their	the.
209	21 „ „	the	their.
248	19 from bottom	defendant's	plaintiff's.
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CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXIX VICTORIA.

QUEENSBURY INDUSTRIAL SOCIETY, LIMITED, *v.* WILLIAM PICKLES AND OTHERS.

1865
Nov. 3.

Industrial and Provident Society—15 & 16 *Vict.* c. 31, *and* 25 & 26 *Vict.* c. 87, s. 6—"*Property*"—*Chose in Action.*

6 Ex. 287

The 6th section of the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), provides that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society":—

Held, that a bond given to trustees for an industrial society, registered under 15 & 16 Vict., c. 31, was, by the certificate of registration under 25 & 26 Vict. c. 87, vested in the society; and that the society could sue on it for breaches of the condition subsequent to the registration.

THE declaration stated, that after the passing of the Industrial and Provident Societies Act, 1852, and whilst that act was in force, and before the passing of the Industrial and Provident Societies Act, 1862; and at the time of the execution of the bond thereinafter mentioned, John Anderton, George Crossland, and Joseph Farrell were trustees of a society called the "Queen's Head

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Industrial Society," the same then being a society duly registered under the first-mentioned act; and that before the registration of the society under the secondly-mentioned act, the defendants executed to the trustees a bond for 100*l.*, dated the 8th of June, 1861, and conditioned to be void if W. Pickles should pay over and account for (as therein mentioned) all moneys, goods, &c., which should come to his hands as salesman of the society; and should save harmless and indemnified the society, its trustees, directors, and members, from and against all loss, &c., which might happen by reason of any act or thing done or omitted by him during his service as salesman of the society. The declaration then averred that the society was afterwards duly registered by its then name of the "Queen's Head Industrial Society, Limited," under the Industrial and Provident Societies Act, 1862, and obtained from the Registrar of Friendly Societies of England his certificate of registration; that it thereupon became a body corporate by the name of the "Queen's Head Industrial Society, Limited;" and that afterwards that name was by due course of law altered to, and the society became incorporated by, the name whereby they sue in this action. "And that at the time of the giving and issuing of the said certificate of registration as aforesaid, the said bond and causes and rights of action were then vested in the said John Anderton, George Crossland, and Joseph Farrell, in trust for the said society, and thereupon all things having happened, &c., the same then became, and still is, vested in the plaintiffs, under and by virtue of and in pursuance of the said Industrial and Provident Societies Act, 1862." The declaration then assigned several breaches by W. Pickles of the above-mentioned duties, subsequent to the incorporation of the society; and averred that, although all conditions precedent had happened to entitle the plaintiffs to be indemnified against the consequent loss, yet they had not been indemnified.

The two sureties, severing in their defence from W. Pickles, pleaded—1. Denial of incorporation; 2. *Non est factum;* 3. That the property in the bond, and right to maintain an action for the causes alleged, did not vest in the plaintiffs as alleged; 4. Denial of the breaches alleged.

Issue was joined on these pleas.

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The cause was tried at Leeds, before Mellor, J., at the last Summer Assizes, when the facts alleged in the declaration were proved, and a verdict was entered for the plaintiffs, with leave to the defendants to move to enter a nonsuit, on the ground that the action was not properly brought in the name of the society, and with a provision for a reference, in case the rule should be refused or discharged. It was also agreed that there should be no appeal, and that the point should be argued for the sureties alone, and the principal debtor should be bound by the decision.

Manisty, Q.C., moved according to the leave reserved. By 25 & 26 Vict. c. 87, s. 6, "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society; and all legal proceedings then pending by or against any such trustee or other officer, on account of the society, may be prosecuted by or against the society in its registered name without abatement." The bond being merely a chose in action, is not "property," and, therefore, did not by the registration vest in the company. It was necessary that pending actions should be transferred to the company, because they may relate to property in a strict sense held by trustees for the society, the whole legal interest in which, and, therefore, the right to maintain an action for it, is taken out of the trustees by the statute; and, accordingly, the section provides in terms for this. But there is not the same necessity for transferring mere contracts or causes of action; which the trustees may still sue upon for the benefit of the society. Further, this case is in principle governed by *Linton* v. *Blakeney Joint Stock Co-operative Industrial Society*, (1) following *Dean* v. *Mellard*, (2) in which it was decided that a society registered under 25 & 26 Vict. c. 87, cannot be sued on a contract made with their trustees before registration.

POLLOCK, C.B. The question in this case is, whether a provident society, formed under 15 & 16 Vict. c. 31, and incorporated by registration under 25 & 26 Vict. c. 87, can, by virtue of the 6th

(1) 3 H. & C. 853; 34 L. J. (Ex.) 211.
(2) 15 C. B. (N.S.) 19; 32 L. J. (C.P.) 282.

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section of the latter act, sue on a bond given to trustees for it before its incorporation. In the first place, ought the legislature to have contemplated and provided for the transfer of this chose in action? Clearly they ought; if, therefore, there be any mode in which we can be justified in giving the statute that effect, if by any fair and reasonable construction of the words they can be taken to signify that intention, we ought so to construe them. I think that the word *property* may well be understood to mean all rights which the trustees held in trust for the society, whether then existing complete in them, or such as would subsequently accrue by virtue of a then existing title. It was clearly meant entirely to supersede the trustees, and to put the incorporated company in their place, and the words of the statute are, in my opinion, sufficient to effect that intention. Besides this, the objection now made arises on the record, and we are all agreed that we ought not to interfere on this motion, but leave the defendants to their remedy by arrest of judgment.

BRAMWELL, B. This is, to my mind, a very plain case. The contention of the plaintiffs is, that at the time of action, the statute had conferred on them a right of action on a bond given before the statute by the defendants to trustees for the plaintiffs. Mr. Manisty says, that there may be many reasons why the statute should not transfer this right to them, although it transfers to them actions already pending; but I confess I can see none. I can see no reason why the beneficial owner of a *thing* (for I will at present only describe the bond in that way) should not bring an action upon it in his own name. The trustees are mere formal persons having no interest in the bond, and were only a machinery rendered necessary by the previous constitution of the society; that constitution being now abolished, there can be no reason why the formalities belonging to it should be retained.

But it is said we must not go beyond the words of the statute. I agree; but the words say plainly that all property held in trust for the society is to be vested in them; that is, something more is given them than they had before. They had before an equitable interest in this bond, therefore now they have a legal interest in it. Mr. Manisty is therefore driven to contend that a bond cannot be property. Now, *property* is not a term of art, but a common

English word, which must be taken in an ordinary sense, and any ordinary person would certainly think it strange, if he were told that a debt due to him was not part of his property. And this meaning is evidently required by the act, since the contrary construction would be followed by the absurd consequence, that this society, although it could continue actions already pending, yet has no power to initiate proceedings for a similar cause of action.

As to the cases cited, they have no application; if there had been anything in the statute saying that registration should impose on the society obligations formerly due from their officers, the question arising in those cases would have been similar to the present one; but they proceed upon the total absence of any such words in the statute. Here there is no question of imposing obligations on the society, but of vesting rights, for which purpose express words are introduced, and, therefore, the application of the cases cited is not well founded.

But further, I am inclined to think that the point arises on the record; because, if Mr. Manisty's argument is analyzed, it amounts to this: the bond is not property, and, therefore, could not vest by the statute; if this is so, the declaration states that which is erroneous in point of law, and should, therefore, have been demurred to and not traversed. The finding at the trial was right according to the pleadings, and the point can only be raised in arrest of judgment.

CHANNELL, B. If there is any objection here which would avail the defendants, it arises on the record, and ought to be taken advantage of in arrest of judgment. But to decide the case on that formal ground would be too narrow, and I prefer to base my judgment on the merits. The cases which were brought before us, one decided in the Common Pleas, and one in which this court followed that decision, were both cases in which the question was as to the liability of the society to be sued for debts due from their public officer before registration, and it was held that s. 6 of 25 & 26 Vict. c. 87, was not sufficient to subject them to that liability. Now we are dealing with a totally different question, namely, whether that section avails to transfer rights. The old society was not a corporation, and the intervention of trustees was, if not absolutely necessary, at least very useful. But on registra-

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tion under the act of 1862, the society becomes a corporation, and the intervention of trustees being no longer required, it was intended by the act to transfer to the society all their rights It would be a very limited construction of the words of the act not to read them as meaning to transfer to the society whatever rights were vested in the trustees for their benefit, since the object of the statute is to enable them by being incorporated to dispense with the trustees altogether.

PIGOTT, B. concurred.

Rule refused.

Nov. 8.

FINNEY *v.* FORWOOD AND OTHERS.

Interrogatories—Common Law Procedure Act, 1854 (17 & 18 *Vict.*, *c.* 125), *s.* 51—*Discovery of Plaintiff's Title.*

The rule allowing, in cases of ejectment, interrogatories inquiring into the plaintiff's title, will not be extended to other actions.

In an action of trover for cotton, the defendant interrogated the plaintiff how and when he first became possessed of the cotton, and when and in whose hands it was when he first became possessed of it. This interrogatory was disallowed. He also interrogated the plaintiff as to his dealings with the person from whom the defendant had obtained the cotton, but did not show by his affidavit that any such dealings had taken place, or that he had made any inquiries of that person. This was also disallowed.

THIS was an application for leave to administer interrogatories to the plaintiff in an action of trover, brought for 133 bales of cotton. The defendant had pleaded not guilty, and not possessed, and on these pleas issue had been joined.

The affidavit on which the application was made stated the following facts:—

In the month of August, 1865, Messrs. Saunders & Son merchants at Nassau, consigned to the defendants 133 bales of cotton, and accompanied the same with their draft on W. F. Delarue for 2,488*l.* 17*s.* 5*d.*, payable at thirty days after sight.

The defendants duly presented the bill to Delarue, who refused to accept it, and also refused payment on maturity; and the defendants thereupon caused the cotton to be sold in the usual way for the best price. The affidavit further stated, that "it was

not until some time after the said cotton had been sold as aforesaid, that we (the defendants) had any knowledge whatever that the present plaintiff claimed to have any interest in the same, and we are now in entire ignorance in what way or manner he has any right or title thereto, his name not having been used or referred to by Messrs. Saunders & Son on the occasion of their consigning the cotton as before stated."

The interrogatories, so far as is material, were as follows:—

1. How and when did you become possessed of, or entitled to, the cotton, the subject of this action; and where, and in whose hands was the said cotton when you first became possessed of it?

2. When did you part with the possession of the said cotton, and for what purpose, and under what circumstances, and to whom? Into whose possession did the said cotton come after you parted with it? Did you sell, or pledge, or otherwise deal with the said cotton, and if so, to whom and how?

3. Do you know W. F. Delarue? What is he, and what is his business, and how and where carried on? Have you not had dealings with him, and if so, of what kind? Was not the said cotton in his possession, or in the possession of some persons there on his behalf, at Nassau, in March, 1865, or about that time? How and when did it get into his or their possession, and for what purpose, and with what object? Was it not entrusted to him by you, or by some person who acted by your authority, or derived or claimed title to it from or through you, in order that it might be sent to Liverpool, or to some other port for sale?

4. Has the said W. F. Delarue or any other, and what person or persons, advanced you money upon the security of the said cotton? Were you indebted to him or them whilst the said cotton was in his or their possession, for the money so advanced, and for any other money in respect of which he or they claimed to hold the said cotton?

Martin, B. had refused leave to administer these interrogatories, and this was an appeal from his decision.

Crompton Hutton, in support of the application, contended that it fell within the rule governing discovery in equity, viz., that though one party could not ask the other for his case, yet he

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might ask discovery as to what was the common case of both parties.

[MARTIN, B. Where is there any common case here? The defendant does not suggest that the plaintiff has done anything to establish his case, but claims under some other person who has shipped the goods to him with a bill of lading, and with whom he does not show the plaintiff to have had any dealings. Suppose A buys a horse of B, and C brings an action for the horse against A, can A ask C how and where he got it?]

[CHANNELL B. You must admit an original title in the plaintiff, and then ask what were his dealings with Saunders.]

The interrogatories are directed to discover whether the plaintiff has not so dealt with Saunders or some other persons, as to entitle Saunders to pass the property in these goods.

[MARTIN B. As to that part of the interrogatories, it is not stated that the defendants have made inquiries of Saunders as to where he got the cotton from; if he told them that he had dealings with the plaintiff, who put it into his hands, and that he sold under an express or implied authority from him, they might then interrogate the plaintiff on this. But you lay no basis for your application.]

It is conformable to what has been done in the case of ejectments that these interrogatories should be allowed; in *Fliteroft* v. *Fletcher* (1), the defendant was allowed to ask in what character, or by what right, the plaintiff claimed possession; and the defendants are here within the reason of the rule, they and their consignors having been in possession since March, 1865.

[POLLOCK, C.B. The case of ejectment has always been regarded as a peculiar one, and we are not disposed to extend the rule.]

7 QB 241

[MARTIN, B. In *Fliteroft* v. *Fletcher* (1), the influence of my Brother Alderson, who had been accustomed to proceedings in equity, led the way to allow such interrogatories in the case of ejectment; but the rule has never been extended to other actions, and in ejectment it is founded on the fact that long possession by the defendant is assailed by a stranger of whose title he is ignorant; as in a late case, where half Wigan was claimed by a person whom

(1) 11 Ex. 543; 25 L. J. (Ex.) 94.

no one had ever heard of. But even in ejectment such interrogatories are not admitted under other circumstances.] (1)

Per Curiam. POLLOCK, C.B., and MARTIN, CHANNELL, and PIGOTT, BB.

Rule refused.

SAVIN *v.* THE HOYLAKE RAILWAY COMPANY.

Nov. 15.

Private Act—Agreement in derogation of it—Equitable pleading.

A clause in a private Act of Parliament, in terms imposing a duty not relating to the public interest, does not invalidate a previous agreement not to exact its performance, made in view of the passing of the act by the person to whom the duty would otherwise, by the terms of the act, be due, with the persons subjected to it, or with other persons on their behalf.

The plaintiff had agreed with the promoters of a railway bill, to bear the costs of obtaining and passing it. The bill was passed, and contained the usual clause, directing payment by the company of the costs of obtaining and passing it. To an action for his costs, the company pleaded, equitably, the previous agreement:—

Held, a good plea.

Semble that the replication which alleged a rescission of the agreement before breach was bad; but that it would have been good if it had alleged a rescission before work done.

An equitable plea makes the subsequent pleadings equitable, though not so pleaded.

THE declaration stated that, before the passing of the Hoylake Railway Company's Act, the plaintiff bestowed his work and labour, of the value of 5,000*l.*, and expended moneys amounting to 3,000*l.* in and about the applying for, obtaining, and passing of the said act of parliament, and in and about divers other matters and things and expenses preparatory and relating thereto. And that it was in the said act provided, that all costs, charges, and expenses of and incident to the obtaining and passing of the said act, or otherwise in relation thereto, should be paid by the defendants. Averment of the performance of conditions precedent. Breach, non-payment by the defendants.

Second plea, by way of defence on equitable grounds, that before the passing of the said act, the plaintiff was desirous of obtaining the passing of the said act, and of constructing the railway thereby

(1) *Stoate* v. *Rew*, 14 C. B. (N.S.) 209; 32 L. J. (C. P.) 160, followed by *Pearson* v. *Turner*, 16 C. B. (N.S.) 157; 33 L. J. (C. P.) 224.

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authorized and empowered to be made, in order that certain other railways in which the plaintiff was then interested, might be connected with the Birkenhead Docks, which connection would be effected by the passing of the said act and the construction of the railway in the first count mentioned. That the plaintiff, before the application to parliament for the said act, and before any part of the plaintiff's claim in that count mentioned was incurred, induced certain other persons to become the promoters of the company by the said act incorporated, and to co-operate with the plaintiff in the applying for and obtaining the passing of the said act, upon the faith of an express agreement between the plaintiff and the said persons, that he, the plaintiff, would bear and pay all the costs, charges, and expenses of applying for and obtaining and passing the said act, and in relation thereto, and that neither the said persons, nor the said company when incorporated, nor any other person, should be liable to the plaintiff for the payment to him of the same or any part thereof.

Demurrer and joinder.

Replication to the second plea: That after the alleged agreement, and before any breach thereof, and before the passing of the said act, the said persons exonerated and discharged the plaintiff from his said agreement, and from the performance thereof.

Further replication to the same plea, that, after the said alleged agreement, and before any breach thereof, and before the passing of the said act, it was agreed by and between the plaintiff and the said persons, that the said contract should be rescinded, and they then rescinded the same accordingly.

Demurrer and joinder.

Littler, in support of the demurrer to the plea, and of the replication. First, this is an attempt by the company to take advantage of an agreement made with third parties, which is against the rule both of law and equity, except under special circumstances. The promoters of the company with whom the alleged agreement was made, are wholly distinct from the incorporated company constituted by act of parliament. *Preston* v. *The Liverpool, Manchester, and Newcastle-on-Tyne Junction Railway Company.* (1)

(1) 5 H. L. C. 605.

[POLLOCK, C.B. Your argument would shew that no company could take advantage of any agreement made before their incorporation for their benefit. Do you mean to say that if the plaintiff had given the promoters a guarantee to indemnify the company against the payment of these costs, such a guarantee would not be binding, and that a court of equity would not avoid circuity of action by restraining an action for them? It seems to me that the special circumstances, which you say are necessary, exist.]

Secondly, this is an attempt to repeal the act. The act has imposed the burden upon the defendants, and that liability cannot be got rid of by a private agreement. Fraud only can affect the operation of a statute, though private: 5 *Cruise Dig.* p. 23.

[POLLOCK, C.B. A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it, provided the agreement be not (as this is not) inconsistent with the public interest, or morality? Suppose the plaintiff had absolutely released all claim under the act, could he afterwards have recovered?]

[PIGOTT, B. Your argument must go the length of saying that he might recover although he had been paid off.]

The defendants were themselves parties to getting the act passed, and must be taken to have rescinded the agreement, having consented to the insertion of a clause which in terms provided for these costs.

[POLLOCK, C.B. The clause is nothing but the ordinary clause which occurs in every act of this nature. But in truth the contention of the defendants will be that there were never any costs at all. The plaintiff consented to do the work for nothing on account of some private interest he had in the matter, and the clause was not intended to impose on the company a liability to pay what was before no debt.]

[BRAMWELL, B. In fact, it seems that the defence might be raised on a plea of never indebted.]

At least the replication is good.

R. E. Turner was called on to support the demurrer to the replication. The plea shows that the work was so done as not to create any obligation to pay, and the replication saying that the plaintiff

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was exonerated from his agreement to do the work gratuitously, shews no consideration for this new agreement.

[CHANNELL, B. At law it might be necessary to shew a consideration, or a release by deed; but would not the agreement alleged avail the plaintiff in equity?]

This is not pleaded as an equitable replication.

[CHANNELL, B. Every replication to an equitable plea is an equitable replication, and may be supported on any ground that shews an answer to the plea.]

A mere promise to pay cannot constitute a liability either at law or in equity, and, therefore, the rescission of the former agreement after the work was done will not benefit the plaintiff. But there is no averment that the rescission took place before the work was done, but only before breach of agreement, and no other date can be inferred.

[BRAMWELL, B. That seems to be so. You say the act means only that the plaintiff is to be paid for those things which he was by agreement to be paid for, and not for those which he has agreed to do without payment. You admit that if he and the promoters had undone the agreement before the doing of the work, he would have been entitled to be paid, but you say it does not appear that this took place till after the work was done, and it could not then alter the gratuitous character of the service, and you say the replication must show that the work was done on the terms of being paid for it. I do not absolutely say that the replication is bad. Neither do I say that it would be necessary that all the work charged for should be done subsequently to the new agreement. A man may do nine-tenths of a job for nothing, and then finish the other tenth in consideration of being paid for the whole; but it would be prudent to amend.]

Littler, in reply.

Per Curiam. POLLOCK, C.B., and BRAMWELL, CHANNELL, and PIGOTT, BB.

Judgment for the defendant on the demurrer to the plea; and as to the replication, leave to amend.

STUBLEY *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

1865
Nov. 18.

Negligence—Railway—Level crossing.

There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company.

A railway was crossed by a public footway on a level, and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but on the level of the line it could be seen for 300 yards each way. A woman approaching the line by that gate was detained by a luggage train on her side, and immediately on its having passed, crossed the line, and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains:—

Held, that there was no evidence of negligence on the part of the company, but that there was evidence of negligence on the part of the deceased.

Bilbee v. *The London, Brighton, and South Coast Railway Company*, (1) considered.

DECLARATION by the plaintiff, as husband and administrator of Mary Stubley, stating that the defendants' railway crossed a public highway on the level, and that the "defendants did not take reasonable and proper care, or use reasonable and proper means for the protection of persons using the highway, where it was so crossed by the railway;" and that Mary Stubley, whilst lawfully using the highway, was knocked down by the defendants' train, and died from the effects of the injuries. The defendants pleaded Not guilty.

The cause was tried at the Summer Assizes at Leeds before Blackburn, J. It appeared on the evidence that, at the place where the accident happened, the defendants' line was crossed by a public footway on the level. The footway ran between Morley and Batley, and was much frequented owing to the neighbourhood of a mill. Morley lay on the right-hand side of the line going from Dewsbury to Leeds, and Batley on the left-hand. The footpath on each side of the line was protected from it by a swing-gate placed at some distance from the rails. Since the defendants' railway had been constructed, it had been crossed at this place by

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

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the Great Northern Railway, which passed over it diagonally by a bridge. At the Batley gate, owing to the obstruction to the view caused by a pier of the bridge, a person standing there could not see a train coming from Leeds for a greater distance than thirty yards along the line; but, by going within about nine feet of the line, he could see 300 yards each way. Caution boards, with "Beware of the Engine" written on them, were placed on each side of the line. About sixty trains usually passed the spot in the course of the day.

On the morning of the 9th of December, 1864, the deceased came from Batley to cross the line to Morley, and was detained by a luggage train which was going from Dewsbury to Leeds, and passing over the footway on her side of the line. As soon as the luggage train had passed, she proceeded to cross the line, but just as she reached the other metals, the express train from Leeds, which she had not observed, came up, and struck her down and killed her.

A man who was coming from the opposite direction, and who was the only witness of the accident, had also been detained by the luggage train at the Morley gate; and his evidence was, that as soon as the luggage train had passed, he saw the deceased coming across, and just stepping on to the rails on his side, and, being able from the Morley gate to see the express train coming, he shouted to her twice and held up his hand; but she, being somewhat deaf, and having her eyes fixed on the rails, neither saw nor heard him.

At the close of the plaintiff's case the counsel for the defendant submitted that there was no evidence to go to the jury; but the plaintiff's counsel having called the attention of the learned judge to the case of *Bilbee* v. *The London, Brighton, and South Coast Railway Company*, (1) and to the ruling of Pollock, C.B., in the case of *Stapley* v. *The London, Brighton, and South Coast Railway Company*, (2) the learned judge reserved leave to enter a nonsuit if there was no reasonable evidence to go to the jury; and subject to that leave, he told the jury to assume for the purposes of the day, and only for that purpose, that the law casts upon the company the duty of taking all reasonable

(1) 18 C. B. (N.S.) 584; 34 L. J. (C. P.) 182. (2) Post, p. 21.

precautions for the purpose of protecting the passengers from risk, including that of keeping a watchman to warn passengers of the approach of a train, if from the nature of the traffic at that place that is a reasonable practice; and he left to the jury the questions—Was there negligence on the part of the company? and could the deceased, with reasonable care on her part, have avoided the accident? Under this direction, the jury found a verdict for the plaintiff; adding that they were of opinion that, at this crossing, there ought to be reasonable precautions taken by the company beyond what they had taken.

Overend, Q.C., having obtained a rule (1) to show cause "why a nonsuit should not be entered, or a new trial had, on the ground of misdirection by the learned judge in stating to the jury that the railway company was bound to provide other protection to the public than that which it had already provided"—

Manisty, Q.C., and *Kemplay* showed cause.—The company were guilty of negligence. They were bound to have a watchman at the crossing; they are not, by the statutory duty imposed by 8 & 9 Vict. c. 20, s. 61, exempted from the common law duty of taking reasonable care to enable the public to use the highway with safety. A railway differs from an ordinary highway in this, that, in the latter case, passengers crossing it are protected by the duty imposed upon those who run carriages along it to go at a reasonable speed. The legislature, when it authorized railway companies to run trains across a public highway at a level, must have assumed that they would use precautions to protect the public in the use of their pre-existing rights.

[BRAMWELL, B. That is not denied. Mr. Overend admits that if any other precautions than those which were taken were reasonably necessary, they ought to have been taken; but he denies that any others were necessary. What omission do you complain of?]

(1) Upon the argument, some discussion arose as to the form of the rule, and as to whether the defendants were at liberty to make use of the argument of contributory negligence; and it was ordered that in case of appeal the rule should be amended according to the leave reserved at the trial, and that it should be now argued upon that footing.

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The presence of a watchman would have prevented the accident. The jury have found that some other precautions should have been taken than were taken, and their finding is conclusive, for the case of *Bilbee* v. *The London, Brighton, and South Coast Railway Company,* (1) shews that if any state of circumstances exists which raises the question whether further precautions ought to be taken, that question cannot be withdrawn from the jury.

[BRAMWELL, B. That case rather seems to decide that it may, under some circumstances, be a question for the jury whether further precautions were necessary, and that, in that case, those peculiar circumstances existed which made it proper to leave that question to them.]

Those circumstances exist here; the effect of the bridge was the same as that of a curve in obstructing the view along the line: *Ford* v. *The London and South Western Railway Company.* (2)

Overend, Q.C., and *Maule,* in support of the rule.—The case of *Bilbee* v. *The London, Brighton, and South Coast Railway Company,* (1) turned on the fact that the way was a carriage way. Every person going into a dangerous place is bound to take care of his own safety, and the inutility of the precaution suggested is shewn by the fact that, in this case, a man was actually there who did all that a watchman appointed by the company could have done. The argument of the other side would shew that, not one but, two watchmen should be placed there. The line was visible for 300 yards each way to a person standing on the level of the line, and the accident was entirely due to the carelessness of the deceased in crossing immediately behind the luggage train, without waiting to see whether the other line was clear: *Wilkinson* v. *Fairrie.* (3)

POLLOCK, C.B. I am of opinion that this rule should be made absolute. I can see no evidence of negligence on the part of the defendants. The railway runs in a straight line for hundreds of yards on either side of the place to which the deceased must come before crossing the line. It is in itself a warning of danger to

(1) 18 C. B. (N.S.) 584; 34 J. L. (C. P.) 182

(2) 2 F. & F. 730.

(3) 1 H. & C. 633; 32 L. J. (Ex.) 73.

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those about to go upon it, and cautions them to see whether a train is coming. It is true that a public footway crosses the line on a level, but the legislature saw no mischief in allowing the railway to be constructed thus without requiring the erection of a bridge, and it cannot be said that the defendants were bound to make one of their own accord. Is there anything in the circumstances making it necessary to have a watchman there, or to take further precautions than were taken? I can see nothing, and therefore think that there was no evidence to go to the jury, and that a nonsuit ought to be entered.

BRAMWELL, B. I am very clearly of the same opinion. It is easy to use general expressions about negligence, but this facility makes it convenient to call on counsel, as we did on Mr. Manisty, to point out what in particular the defendants ought to have done in the way of precaution. He says they ought to have had some one there to detain passengers who were about to cross in a dangerous manner; but such a person would have had no power to detain, but only to warn them not to cross. Then is there anything in the actual facts making it reasonable that a man should be placed there for that purpose? It is said that if any one stands at the Batley gate, he cannot see the train until it is within thirty yards of him; but at that point he does not put his foot on the line, but has to go a good deal further to reach the level, and when he is on a level with the line, he can see 300 yards in each direction. Now 300 yards is the sixth of a mile, and a train going at thirty miles an hour would take twenty seconds to pass over this distance. A man walking at a rate of four miles an hour would take three seconds to cross the line; and if we suppose a woman to go at half that pace, she could cross it three and a half times before the train could reach her from the place at which it first came in sight. Need there be any one to warn persons of a train which they can see so far off that, if they only take the trouble to look out for it, it cannot overtake them in crossing? But it is said that the trains are so timed that they meet and pass one another at this point. Can it be said that the defendants must not so arrange them? This is not contended; but Mr. Manisty says that, if they do, they must warn the passengers. Warn them of what? That when a carriage on your own side of

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a road is passed, you will often find on the other side of the road a carriage which has not passed. A policeman then is to be placed there to tell them, not what they do not know, but what from carelessness or heedlessness they forget at the moment when it ought to be remembered. If such a precaution is necessary here, it must also be used elsewhere; and the argument would shew that on every road, every canal, every railway in the kingdom, means must be taken to warn people against the consequences of their own folly. It would cost too much to provide such a machinery of precaution. But besides this, I look upon all those rules, regulations, and provisions which are made to take care of people when they should take care of themselves as positively mischievous; and this case is an illustration of what I mean. Mr. Manisty says that the watchman would know the times when trains are to pass; but are there to be no special trains, no engines travelling backwards and forwards at uncertain times for the purposes of the traffic, which would not be expected, and of which he could give no warning? A passenger, trusting to his knowledge, would go on, and running into danger, would then turn round and say, "I took no precautions, because I relied on the watchman," and the very means intended to save the passenger from an anticipated danger would lead him to run into one which was not anticipated. I do not go on the ground that a person in the act of crossing the rails and suddenly seeing a train approaching upon him, ought to step back, because persons of ordinarily steady nerves might well be too much stunned to have complete command over themselves at the moment. But I proceed on this, that, in crossing the rails at all, this woman was, as people often do, heedlessly going on at the rear of a passing vehicle on her side, without waiting to see whether the other line was clear.

As to *Bilbee* v. *The London, Brighton, and South Coast Railway Company*, (1) I need only say, that I do not think we can treat it as an authority in point. I do not mean to say that it was not rightly decided, but that it is no precedent. The Chief Justice, in the beginning of his judgment, guards against the notion of its being an authority for other cases, and bases his decision on the particular circumstances of the case. Now, no doubt, if a railway is so made

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that a person cannot see an approaching train on account of an abrupt turning or a tunnel, then, on general principles, a peculiar duty of care might be cast on the company; for a passenger may justly say, "I might stay here for ever without being able to tell whether the line is safe;" and that is all that is decided by the case in the Common Pleas. But here it is manifest that if the deceased woman had waited, she would have had ample opportunity to provide against the danger, and had no need to be told of its probability. There is, then, no evidence of negligence on the part of the defendants, but obvious negligence on her part, and the rule must, therefore, be made absolute.

CHANNELL, B. I am also of opinion that this rule should be made absolute to enter a nonsuit. At the trial the learned judge's attention was called to the recent case of *Bilbee* v. *The London, Brighton, and South Coast Railway*, (1) and my only doubt was whether our decision in favour of the defendants would not clash with that case. But it appears to me that, as my Brother Bramwell has said, the decision does not conclude us, for it does not lay down any distinct rule. The question therefore is,—was there any evidence of negligence for the jury? I do not enter into the question of whether the leave reserved involved the further inquiry as to contributory negligence, because I base my judgment on the ground that there was no evidence to go to the jury of negligence in the company. The learned judge who tried the cause, being pressed by *Bilbee* v. *The London, Brighton, and South Coast Railway Company*, (1) considered it convenient to leave to the jury the question of whether any further precautions ought to have been taken by the defendants, and directed the jury to assume for the purposes of the day that the law imposed on them the duty of taking precautions, showing a doubt in his own mind, and on receiving the answer of the jury in favour of the plaintiff, reserved the point. Now, looking at the facts of the case, it appears that warning boards were placed on each side of the line. It is not suggested that the train, though an express train, was going at an improper speed. So far there is no evidence of negligence in the defendants, and the only suggestion made is, that they ought to have had a watchman to warn the public of approaching trains. But passengers crossing the rails are

(1) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

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bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended. And this ordinary care would be sufficient to prevent most accidents, and would in this case have prevented the accident; but the deceased forgot to take account of the possibility of the opposite side of the line being occupied by another train, which had been hidden from her by the passing luggage train. As Mr. Overend justly says, the argument of the plaintiff would require not one watchman, but two; for there was here a man on the other side of the line who called out twice to the deceased, and it is difficult to see what more a watchman could have done. The Chief Justice, in his judgment in *Bilbee* v. *The London, Brighton, and South Coast Railway Company*, (1) says, "I do not mean to lay it down as a rule that they are bound to place guards wherever a footway crosses the line on a level;" and there are not here circumstances of such a kind as to create the necessity which was there shown.

PIGOTT, B. I am of the same opinion. I should be sorry to disturb the verdict, if there were any reasonable evidence of negligence on the part of the defendants; but I can find none. It is suggested that a watchman should have been stationed at the crossing; but what would his duties have been? He could have done no more than was done by the only witness of the accident. I cannot help saying that the deceased stepped into danger in a thoughtless way, and put herself in peril, and took the chance of what might be coming. I do not say that in no case ought railway companies to station watchmen at public crossings of this nature, but such cases must be exceptional; and there would be no limit to their liability if it were left loosely to juries in every case to say whether any further precautions ought to have been taken. I can see no evidence of negligence in the defendants, and therefore agree that the rule must be made absolute.

Rule absolute to enter a nonsuit. (2)

(1) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

(2) See the next case.

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Nov. 25.

STAPLEY AND ANOTHER, EXECUTORS, *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Negligence—Railway Company—Level Crossings—Injury to foot-passenger—Absence of Protection for Carriage Traffic.

The defendants' railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way, and a turnstile for the use of foot-passengers. S., a foot-passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of the defendants' trains. At the time of the accident, contrary to the provisions, by statute and by the defendants' rules, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gate-keeper present to take charge of them; although no traffic was passing across, and although a train was overdue. In an action against the defendants by the executors of S.:—

Held, that there was, under the circumstances, evidence of negligence on the part of the defendants to go to the jury, inasmuch as by neglecting the required precautions for the safety of carriage-traffic the defendants might be considered to have intimated that their line might safely be traversed by foot-passengers.

Bilbee v. *The London, Brighton and South Coast Railway Company*, (1) followed.

THIS was an action for negligence brought against the defendants under the provisions of 9 & 10 Vict. c. 93 by the plaintiffs as executors of John Stapley, deceased.

The declaration stated that the defendants were, at the time of the committing of the grievances thereinafter mentioned, possessed of a railway from Brighton to Chichester, and of divers carriages, &c., then used by them for the traffic of goods and passengers over that railway; that the railway crossed a certain highway on a level near the Portslade station, to which station there was an approach from the highway across the railway used by passengers with the defendants' leave; that the defendants were subject to the provisions as to railways crossing highways, contained in or referred to by the 9 & 10 Vict. c. 283 (their special act), and the acts therewith incorporated; yet the defendants so negligently managed their railway and certain gates erected by them, in accordance with the said acts, upon the said highway where it crossed their railway, and omitted to provide proper access to their station, and so negligently managed a certain train upon their railway where it crossed the said highway, that John Stapley, whilst law-

(1) 18 C. B. (N. S.) 586; 34 L. J. (C. P.) 182.

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fully on his way from the said highway across the railway to the Portslade station, was knocked down by the said train, and killed.

The defendants pleaded, first, Not guilty, and, secondly, that the deceased was not lawfully on their railway at the time of the happening of the accident.

At the trial, before Pollock, C.B., at the London sittings after Trinity Term, 1865, the following facts were proved:—

The Portslade station is between Brighton and Chichester, a few miles from Brighton. The line is on an incline towards Chichester, and, crossing the line by a level crossing close to the station, within about a yard of the platform, is a public highway, running north and south. There are swing-gates across the carriage-way, and a swivel gate, or turnstile, at the side for foot-passengers. At a bridge about six hundred yards nearer Brighton than the level crossing there is a curve, from which point the line can be seen by a person at the crossing. Amongst the rules to be observed by the defendants' servants are the following respecting level crossings:—

"219. Unless a written order is given to the contrary, the gates must be kept shut across the carriage-road, except when required to be opened to permit the railway to be crossed.

"220. Whenever it is required to cross the railway, the gateman must, before opening the gates, satisfy himself that no train or engine is due or in sight; he must then shew his stop signals, which must remain exhibited until the line is clear."

"225. Gatekeepers must prevent as much as possible any person trespassing on the railway."

Section 1 of 2 & 3 Vict. c. 45 enacts that "wherever a railroad crosses any turnpike road or any highway or statute labour road for carts or carriages the proprietors or directors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad."

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Section 9 of 5 & 6 Vict. c. 55 enacts that the gates at such crossings shall be kept "constantly closed across each end of such turnpike or other roads," except during the time when horses, cattle, carts, or carriages shall have to cross the railway.

Section 47 of 8 & 9 Vict. c. 20 (The Railway Clauses Consolidation Act, 1845) enacts that "if the railway cross any turnpike road or public carriage road on a level, the company shall erect, and at all times maintain, good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross the said railway; and such gates shall be so constructed as, when closed, to fence in the railway; and the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses, &c., shall have passed through the same, under a penalty of 40*s.* for every default therein."

On the afternoon of the 3rd of January, 1865, the deceased, who had come in the early part of the day by the defendants' railway from Worthing (a station between Portslade and Chichester) to Portslade, was returning to the station by a road which led him to the level crossing upon the north side. An express leaves Brighton daily a few minutes before the train which the deceased was coming to meet. The express does not stop at Portslade. When the deceased reached the railway the express was already overdue some few minutes, but had not passed. The gates on the side on which the deceased was approaching were partly open; on the other side, although not fastened, they were closed. Half an hour before the accident they had been seen closed on both sides. No gatekeeper was on the spot, nor was any one upon the platform of the station, although, generally speaking, an official of the railway company was placed on the platform when trains were expected to pass through. In the present case his absence was accounted for by the fact that the station-master was ill, and the staff of servants was therefore incomplete. The reason assigned for there being no one at the gate was, that the regular gatekeeper, having been killed some time before, his duties were being temporarily per-

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formed by a signalman, who was, at the time of the accident, engaged elsewhere.

The deceased, on arriving at the crossing, walked on to the line either through the open carriage gate or through the turnstile. When he got to the space between the up and down lines he was seen by a porter, who was unloading some trucks at a goods shed, walking, with his head bent towards the ground, in the direction of the station platform, and not directly across towards the gates on the other side. The porter shouted to him to stop, but he continued advancing, and the next instant was knocked down by the express from Brighton. The engine-driver of the train sounded no whistle until the accident was actually taking place. It appeared that the deceased was deaf to some extent, but not so much as to prevent his hearing any loud sound. He was in the habit of using the defendants' railway, and might therefore be taken to be aware of the times at which the various trains ran upon it. The diagonal path he took was a short-cut to the station, and it was not unusual for passengers to make use of it instead of crossing the line directly from side to side, and then walking to the platform.

The learned judge, in summing up, left it to the jury to say whether the accident resulted from any want of care or precaution which the defendants were bound to take for the safety of the public, or whether it resulted from the carelessness of the deceased himself. The jury found a verdict for the plaintiffs.

Bovill, Q.C. (Nov. 6), obtained a rule *nisi* calling on the plaintiffs to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the verdict was against evidence; also on the ground that the deceased had by his own want of care contributed to the accident; and on the ground of misdirection in this, that the learned judge ought to have directed a verdict for the defendants.

Manisty, Q.C., Garth, and *Marshall Griffith* (Nov. 14) shewed cause. There was evidence of negligence on the part of the company to go to the jury. They have a right by statute to cross highways on level crossings, but they are still bound to take all reasonable precautions to protect the public from injury. Their common law

liability remains, although they have statutory powers: *Vaughan* v. *The Taff Vale Railway Company*, (1) in the Exchequer Chamber. It is true that the judgment of the Court below was reversed, but the principle there laid down was recognised; *Bilbee* v. *The London, Brighton, and South Coast Railway Company* (2); *Marfell* v. *The South Wales Railway Company* (3); *Fawcett* v. *The York and North Midland Railway Company* (4). Again, their rules are not applicable to carriage traffic only; and even if they were, the company have no right by negligence in respect of their carriage traffic to invite foot-passengers to cross the line. Rule 225, however, applies to every sort of traffic. Here the defendants took no precautions of any kind. The gates were not properly shut, there was no gatekeeper, and no one on the platform of the station.

[CHANNELL, B.—Must not *affirmative* negligence be shewn?]

It is enough to shew the absence of any kind of precaution: *Byrne* v. *Boadle;* (5) *Scott* v. *The London Dock Company.* (6) S. C. in the Exchequer Chamber. (7)

[They also contended that the verdict was not against the weight of evidence.]

Bovill, Q.C., Denman, Q.C., and *Hannen,* in support of the rule. The rules and statutes apply to the case of carriage traffic only. The company are under no obligation, either by statute or common law, to have any one on the platform of the station, nor are they to be obliged always to have a gatekeeper at every crossing. Where a duty is imposed for a particular purpose (as in this case, for the protection of carriage traffic), a neglect in the performance of that duty gives no right of action, except to those who are intended to be benefited. It was the duty of the deceased to have kept a look-out for danger, as he was in a dangerous place: *Wilkinson* v. *Fairrie.* (8) Foot-passengers crossing a railway must exercise the same caution as in crossing a road; and in order to make the owner of a carriage liable for running over a person

(1) 3 H. & N. 743; 28 L. J. (Ex.) 41; 5 H. & N. 679; 29 L. J. (Ex.) 247.

(2) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

(3) 8 C. B. (N. S.) 525; 29 L. J. (C. P.) 315.

(4) 16 Q. B. 610.

(5) 2 H. & C. 722; 34 L. J. (Ex.) 13.

(6) 34 L. J. (Ex.) 17.

(7) 34 L. J. (Ex.) 221.

(8) 1 H. & C. 633; 32 L. J. (Ex.) 73.

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crossing an ordinary road, some *affirmative* act of negligence must be shewn: *Cotton* v. *Wood.* (1)

[They also contended that the verdict was against the weight of evidence.]

Cur. adv. vult.

Nov. 25. CHANNELL, B., delivered the judgment of himself and PIGOTT, B., as follows:—This was an action tried before the Lord Chief Baron, when a verdict was found for the plaintiff. A new trial was afterwards applied for early in this term, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection. The case was argued before my Lord, and my Brother PIGOTT, and myself. When the arguments closed we took time to consider our judgment, until another case, somewhat similar in its circumstances, had been heard. [*Stubley* v. *The London and North Western Railway Company, ante* p. 13.] We are of opinion that the rule should be discharged. On the first point the Court entertain no doubt. They do not consider that the verdict was against the weight of evidence, nor do they think that the deceased was guilty of such contributory negligence as to disentitle the plaintiffs to recover.

But it was also contended that there was no evidence of negligence on the part of the company to go to the jury. We are not, however, of that opinion. The deceased was knocked down and killed by an express train near the Portslade station, near to which the railway intersected a public footway and a public carriage way. On each side of the railway were gates which were not, it seemed, kept fastened. Besides the gates for carriage traffic, there was a swing gate, or turnstile, for foot passengers to pass through, when the carriage gates were shut. The train, on the occasion of the accident, was about four minutes late, and the deceased when he was knocked down was crossing the line towards the platform of the station. It was objected that he was bound, especially as he was deaf, to look whether any train was approaching; that he ought, moreover, to have crossed in a straight line, and not have attempted to approach the platform, and that having done so he was guilty of contributory negligence. But the Court,

(1) 8 C. B. (N. S.) 568; 29 L. J. (C. P.) 333.

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as I have said, see no cause to disturb the verdict on that ground.

At the time of the accident one of the carriage gates was open. It did not exactly appear how the gate came to be open. Half an hour before it was proved to have been shut. Nor does it appear how the deceased got on to the line, whether through the open carriage gate or through the turnstile. Now, upon the part of the company, it was argued that whatever obligations they were under for the protection of carriage traffic, neither the statutes nor the rules applied to the case of foot passengers. But by rules 219 and 220 it is provided that "the gates must be kept shut across the carriage road except when required to be opened to permit the railway to be crossed;" and that before opening them the gateman must satisfy himself that "no train or engine is due or in sight." In this case the gate was open, there was no gateman present, and the train was overdue. Supposing, then, the case had been one of a carriage passenger, there would have been negligence proved against the company. Then, the carriage gate being open, and no gatekeeper present, a foot passenger was invited by that state of things to pass across the line, and the conduct of the company, therefore, was, we think, evidence of negligence to go to the jury. The case depends upon the principle of *Bilbee* v. *The London, Brighton, and South Coast Railway Company.* (1) We adopt the opinion there expressed by Erle, C.J., that we ought to be careful not to impose any undue burdens on railway companies that are not imposed on them by act of parliament, and we do not say that a railway company must keep servants at every crossing. At the same time, we concur in the view presented to us by Mr. Manisty, that the company are not to be exempt from using due and ordinary care, although their statute gives them the right of crossing public ways on a level. On these grounds the court are of opinion that the Lord Chief Baron could not have withheld the case from the jury.

POLLOCK, C.B. I entirely concur in the opinion of the rest of the Court. I thought at the trial that I could not withhold from the jury what was evidence of negligence against the company in respect of the carriage way. It is admitted that had the deceased

(1) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

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been a carriage passenger, the plaintiffs would have been entitled to recover, but it is said that the deceased, being a foot passenger, had no right to avail himself of the carriage way. The rules of the company, however, require that there should be a man at the gate at a crossing such as that at which the accident took place. There was, in fact, no man there, for the reasons explained at the trial. Then the deceased, on coming to the spot, and looking around him, might well conclude that no train was expected. It is contended that he was bound, in any event, to have kept a look-out against danger; but the company by their conduct clearly intimated to him that no train was approaching, and it cannot be said that there was no evidence of negligence on their part. The rule must, therefore, be discharged.

Rule discharged. (1)

Nov. 20.

BOUENOIS AND ANOTHER *v.* MANN.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed—Unreasonable provisions.*

In a trust deed under section 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 104), a provision, which makes the composition payable on the trustees' certificate that the deed has been assented to by the statutory number of creditors, is unreasonable.

To an action for debt the defendant pleaded a composition deed, under section 192 of the Bankruptcy Act, 1861, made between the defendant as debtor of the first part, a surety of the second part, a trustee of the third part, and the several persons who had assented thereto, or whose names and seals were thereunto subscribed and affixed, being respectively creditors, either in their own right, or in copartnership, or attorneys or agents of creditors of the defendant of the fourth part, setting out the deed.

Demurrer and joinder.

The clause of the deed mainly in question was the fourth, which was as follows:—

"As soon as the trustee shall, in writing under his hand, certify that these presents have been executed, or in writing assented to or approved of by a majority in number, representing three-fourths

(1) See the preceding case.

in value of the now existing creditors of the debtor, whose debts respectively amount to 10*l.* and upwards, the debtor shall pay to each of his now existing creditors such a sum of money or composition dividend as shall be equal to the amount of five shillings in the pound upon the whole debt now due to such creditors respectively."

The 10th clause provided that, until the deed should become void under the proviso thereinafter contained, the creditors who should be bound by the deed should not (except so far as might be necessary in order to enforce any mortgage, lien, or security, or any rights or remedies against any persons other than the debtor), commence or prosecute any action or suit against the debtor, and that the deed might be pleaded as a release in any such suit or action.

The 12th clause provided that "in case and as soon as the trustee shall at any time hereafter certify, by writing under his hand, that a sufficient proportion, in his judgment, in number and value of the creditors of the debtor has not executed, or in writing assented to or approved of these presents, or the provisions hereof; or in case the debtor shall fail to pay the amounts hereinbefore covenanted to be paid by him, or any, or any one of them, or any part thereof, to the creditors or creditor to whom the same are or is respectively due, upon the same being demanded by such creditors or creditor, then and in either of such cases, these presents and everything herein contained shall, except as to any acts or things theretofore done in pursuance hereof, and without prejudice to any rights of action theretofore accrued hereunder, cease, and be void."

By clause 13 it was declared that the deed was intended to operate as a composition deed, within section 192 of the Bankruptcy Act, and that "if there is anything herein not authorized by the said provisions of the Bankruptcy Act, 1861, to be introduced into a composition deed by a debtor, in conformity with the 192nd section thereof, such unauthorized thing shall be obligatory upon those persons only who, or whose attorneys, partners, or agents, shall have executed or otherwise acceded to these presents, and the respective debts due to, and claims made by them."

Holl, in support of the demurrer. There is no provision for the

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payment of a composition, except that contained in the 4th clause; and that clause is unreasonable, because it makes the payment of the composition dependent on the certificate of the trustees. But the deed binds the creditor (subject only to registration), from the moment that it is in fact assented to by the statutory proportion of creditors. He is therefore bound, and by the 10th clause barred of his right of action, at a time when he has no rights under the deed. And if the trustee should refuse to certify, the creditor can acquire none, without proceeding in Chancery to compel him to do so. The apparent relief from this state of things given by the 12th clause, which makes the deed void if the debtor fails to pay the amount of the composition, is nugatory, because the duty of payment only arises on the certificate of the trustees being given.

[POLLOCK, C. B. The deed binds when the statutory conditions are in fact fulfilled. Is there any provision for the case of the person who has to decide coming to a wrong conclusion?]

There is none.

Harington, in support of the plea. It must be assumed that the trustee will do his duty.

[POLLOCK, C.B. We must assume nothing either way, but he *may* not.]

[BRAMWELL, B. Suppose three-fourths of the creditors did not assent, but he certified that they had; or suppose on the other hand, they had assented, but he certified, under the 12th clause, that they had not, what would be the remedy?]

The trustee is only introduced as a machinery for ascertaining the time when the deed becomes valid, and the condition may be rejected as to dissenting creditors, and those only who have assented be held bound, as is provided by the 13th clause. *Hidson* v. *Barclay*. (1)

[CHANNELL, B. The 4th clause cannot be divided, for if the condition as to the certificate is rejected, there is no time mentioned to which the covenant can apply.]

Holl, in reply.

POLLOCK, C.B. This is a demurrer to a plea setting out a deed

(1) 3 H. & C. 361; 34 L. J. (Ex.) 217.

under the Bankruptcy Act, 1861. In deciding the peculiarly difficult questions which arise under this act, the proper rule to go by is that which has been laid down in the recent cases, that a deed is invalid when it contains unreasonable conditions. The most ordinary form of this is, when all the creditors are not put on the same footing; but that is not the only case. Here the money, which is the composition offered to the creditors, is not to be paid till the assent of the statutory number of creditors is certified by the trustee. This is a perfectly novel provision, and is wholly unwarranted by the act of parliament. It is obvious that it may create great difficulty, for if the certificate is not obtained, the estate cannot be distributed, and what is proposed to be done is not effected. The act intended that when its provisions were in fact complied with, the deed should operate, without the will of any other person intervening, and those who concoct these deeds are not at liberty to require, that when all the statutory conditions are satisfied, something more shall be done before the creditors can obtain any rights by the deed. I think the deed is not within the act, and the demurrer must be allowed.

BRAMWELL, B. I am of the same opinion. Without saying whether this form of clause is convenient or not, or whether it is, or is not a violation of the rule *delegatus non potest delegare*, I think it is unreasonable in point of law. The creditors are not bound by the deed till the event happens which the statute prescribes as the condition of its validity; when that event happens, they are bound; why then is anything further to be done before giving to them such rights as the deed may afford? I cannot see any reason. If they were not to be bound till the giving of the certificate, there might be more necessity for this provision; but the present deed takes away their rights before it confers any new ones upon them. I think the conditions unreasonable, and do not rely upon any presumption as to the trustee performing or not performing his duty.

CHANNELL, B. I agree in thinking that our judgment ought to be for the plaintiff, on the ground stated by my Brother Bramwell. It is not necessary to hold that the provision is inexpedient, or to assume that the trustee will not do his duty; but granting that the provision might be fairly worked out, that discloses no legal

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answer. I take it as a fact that the deed has been executed by three-fourths of the creditors, and I assume, the contrary not being shewn, that the plaintiffs are not executing or assenting parties. It is quite clear that the deed must be supported, if at all, as a composition deed, and there is no provision for the payment of a composition, except that contained in the 4th clause; and therefore if this is struck out, the deed is bad. Now clause 4, if freed from the condition requiring the trustee's certificate of the assent of three-fourths of the creditors, would have been a good and binding contract of composition; but it is clogged and fettered by the introductory words, which make the amount of the composition payable only in the event of the certificate being given; and no time is specified, no event is specified, as that on which the payment is to be due, except the event of the trustee giving his certificate. This is clearly an unreasonable provision. I will say further, that when the statute has carefully prescribed certain conditions for the validity of a deed, such as assent by three-fourths of the creditors, an affidavit of property and debts, and of the necessary assents, registration, and so forth, there can be no reason for adopting any new formality, and it would greatly imperil the safety of any deed to introduce other conditions.

PIGOTT, B. I am of the same opinion, and for the same reasons.

Judgment for the plaintiffs.

Nov. 21.

SUTTON *v.* THE SOUTH-EASTERN RAILWAY COMPANY.

Injunction—Railway Company—Inequality of Charge for "Packed Parcels"—Common Law Procedure Act, 1854 (17 & 18 *Vict.*, *c.* 125), *ss.* 79, 82.

6 Eq 555

The plaintiff, a "packed parcel" carrier, having been charged by the defendants, and having paid to them under protest, a sum for the carriage of his packed parcels beyond the sum charged by them to certain wholesale houses for the carriage of goods of a similar description, brought an action against them to recover the amount of the overcharge, and obtained a verdict, which was afterwards upheld in the Exchequer Chamber, upon argument of a bill of exceptions. The defendants continued, however, to make the same charges, and to receive the same sums of money from the plaintiff for the carriage of his goods, as before, and he therefore issued a fresh writ to recover the money paid by him during another and more recent interval of time. After issuing the writ, he applied, under the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 79, 82, for an

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injunction to restrain the defendants from charging him for the carriage of his goods "otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances":—

Held, that the case was not one in which the Court would exercise their statutory power to grant an injunction.

THIS was a rule calling on the defendants to shew cause why a writ of injunction should not issue to restrain them "from charging the plaintiff for the carriage of his goods otherwise than equally with all other persons, and after the same rate in respect of goods of the like description under the like circumstances."

From the affidavits filed in support of the application, the following facts appeared:—The plaintiff is a carrier, having his principal house of business in London, and having subsidiary houses in various towns in England. A very large portion of his business and business connection lies between London and places situated on the lines of the defendants. His chief employment is to collect small parcels from different sources, and after sorting them according to the places to which they are respectively consigned, to make up all those destined for one place into one package under one address, and to forward them as one parcel to his agent at that place. On their arrival they are delivered to his agent as one parcel, which is afterwards unpacked, in order that the contents may be distributed. The trade of collecting small parcels, and making them up into a packed parcel, is well known, and has been followed by the plaintiff for many years. The profit of the trade arises from the fact that by sending a package of more than 112 pounds weight, what are called tonnage rates are charged by the railway company instead of the small-parcel rate, which is higher than the tonnage rate.

There being this difference between the two rates of carriage, the defendants some time since made a regulation, the effect of which was that the plaintiff was charged for all parcels, although over 112 pounds in weight, forwarded by or from him on their lines of railway, a penny per pound avoirdupois by luggage train, irrespective of the contents of such parcels. This charge was not imposed on other persons for the conveyance by luggage train of parcels of precisely the same size and weight over the same number

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of miles, and between the same points of the defendants' lines; but, on the contrary, several wholesale houses which were in the habit of sending packed parcels for their customers by the defendants' lines were charged the ordinary tonnage rates—that is, at a less rate than the plaintiff was being charged for the carriage of goods of a similar description. The defendants, however, denied that they knowingly made any difference between the plaintiff and the wholesale houses. The plaintiff further stated that he had paid large sums of money from time to time, under protest, to the defendants and other railway companies who had followed the defendants' example, and that he had brought several actions against the defendants to recover these alleged overcharges. In one of these, tried before Martin, B., in London, in July, 1864, he produced evidence of the inequality of the defendants' charges, and obtained a verdict, subject to a bill of exceptions, which was afterwards argued in the Exchequer Chamber, where a majority of the court held that the plaintiff was entitled to recover: *Sutton* v. *The South Eastern Railway Company; Sutton* v. *The Great Western Railway Company.* (1) Notwithstanding this decision, however, the defendants still continued to charge and to receive from the plaintiff the penny per pound avoirdupois complained of, and he therefore issued a fresh writ in August last to recover the overcharges made between the 1st of June and 31st July inclusive, in direct contravention, as was contended by him, of one of their Acts of Parliament (2 Vict. c. 42). The writ was indorsed with notice of his intention to claim an injunction against the continuance or repetition of the injury suffered by him, in the terms above set forth.

Amongst the rules of the defendants, regulating the rate of charge for small parcels not exceeding 112 pounds, is the following:—

"Parcels tied together, or packed in a lump, whether the property of one or more consignees, will be charged at the rate of

(1) 3 H. & C. 800. The same point was, in substance, involved in both cases. Sutton *v.* The Great Western Railway Company alone was argued, it being agreed that the judgment delivered in that case should govern the other. An appeal is pending in the House of Lords against the decision of the Court of Exchequer Chamber.

one penny for every pound weight, exclusive of cartage, but not less than the above [separate parcels] rates."

The 2 Vict. c. 42, (an act to amend the acts relating to the South Eastern Railway Company), s. 17, enacts that "the charges by the said recited acts, or either of them authorized to be made for the carriage of any passenger, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam power or carriage to be supplied by the said company, shall be at all times charged *equally to all persons*, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway."

The 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 79, enacts that, "In all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought, an action, he may, in like case and manner as hereinbefore provided with respect to mandamus (*vide* ss. 68-77), claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

Sec. 82 enacts that, "it shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract, or injury of a like kind arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or a judge upon such terms as to the duration of the writ, keeping an account, giving security, or

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otherwise, as to such court or judge may seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the court."

Field, Q.C., Phear, and *F. M. White* shewed cause. This Court will only grant an injunction in cases where it would be granted by a court of equity, the intention of 17 & 18 Vict. c. 125, s. 79, being to assimilate the remedies at law and in equity. But in such a case as the present a court of equity would decline to interfere. It will only grant injunctions, 1st, in cases of breach of trust; 2ndly, in cases of breach of contract; and, 3rdly, in cases of an infringement of a legal right. The present case falls under none of these heads; certainly not under the first nor the second. But it may be contended that it falls under the third, inasmuch as the plaintiff complains of the infringement of a legal right. Such a right, however, in order that its infringement may be ground of injunction, must be a present subsisting, a continuing, and a special private right. There must also be an injury of some sort to the applicant's property: per Campbell, C., in *The Emperor of Austria* v. *Day;* (1) and per Turner, L.J., in the same case. The court will not interfere to prevent merely illegal acts. Here there has been no breach of contract, and the acts complained of will not be repetitions or continuances "relating to the same property or right."

[BRAMWELL, B. Is not an injunction sometimes granted by a court of equity in cases of infringement of a trade mark?]

It is, but only on the ground that a trade mark is property: *Hall* v. *Barrow*; (2) *The Leather Cloth Company* v. *The American Leather Cloth Company*; (3) and in the present case there is no element of property.

[POLLOCK, C. B. Nor is there any element of continuance. It is not certain that the plaintiff will ever send another parcel by the defendants' line.]

Again, Equity will not grant injunction where there is an adequate legal remedy: *The Attorney-General* v. *The Sheffield Gas*

(1) 3 De G. F. & J. 217, 232, 239, 240, 253.

(2) 33 L. J. (Ch.) 204.

(3) 1 Hem. & Mill. 271; 32 L. J. (Ch.) 721; S. C. on appeal, 33 L. J. (Ch.) 199; S. C. in H. of L. 13 W. R. 873.

Consumers' Company. (1) Here the remedy is not inadequate. The plaintiff could maintain an action for the recovery of his money and interest thereon, or he could apply to the Court of Common Pleas under 17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act), s. 3, for an injunction. That act was passed expressly to meet such a case as the plaintiff's.

The Court, at this point of the arguments, called on

J. Brown, Q.C., and *Philbrick*, in support of the rule. The plaintiff has already brought several actions against the defendants for overcharge, and has recovered in one of them where the court of Exchequer Chamber has decided that his claim is sustainable: *Sutton* v. *The South Eastern Railway Company; Sutton* v. *The Great Western Railway Company.* (2) That being so, the defendants continue to overcharge him, and he therefore asks now to be protected by injunction from the necessity of bringing a series of fresh actions. There is nothing in the provisions of the 17 & 18 Vict. c. 31, s. 3, to abridge the power of this court. His remedy at law, moreover, is not adequate, for he can only recover the principal sums of money detained from him, with interest from the date of the judgment, but not with interest during the detention.

[POLLOCK, C.B. That may be so if the declaration only contains the common count for money had and received, but not otherwise.]

In *Crouch* v. *The Great Northern Railway Company* (3) there was a count in tort. In the other cases on this subject, from *Pickford* v. *The Grand Junction Railway Company,* (4) and *Parker* v. *The Great Western Railway Company,* (5) down to the present case, the declaration has only contained the common money counts.

[POLLOCK, C.B. In *Crouch* v. *The Great Northern Railway Company,* (3) the damages claimed were only for loss of business; in the other cases a technical reason prevented the interest from being recoverable. But I have no doubt that upon a count complaining that the defendants refused to deliver the plaintiff's goods to him, and compelled him wrongfully to pay them a certain sum

(1) 3 De G. M. & G. 304; 22 L. J. (Ch.) 811.
(2) 3 H. & C. 800.
(3) 11 Ex. 742; 25 L. J. (Ex.) 137.
(4) 10 M. & W. 399.
(5) 11 C. B. 545; 21 L. J. (C. P.) 57.

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of money before they would deliver them to him, and claiming damages for being kept out of the use of the money so paid, the interest during the detainer would be recoverable.]

Granting that to be so, still the remedy would be inadequate. Again, the company have violated a legal duty imposed on them by one of their own acts (2 Vict. c. 42, s. 17), whereby it is enacted that the charges for the carriage of goods "shall be at all times charged equally to all persons, and after the same rate per ton per mile in respect of all goods of a like description." The effect of a clause similar to this (5 & 6 Will. IV. c. 107, s. 175) was decided in *Parker* v. *The Great Western Railway Company* (1) to be that the company may be required to carry as common carriers at the same rate for every customer. That case is confirmed by *Sutton* v. *The Great Western Railway Company* (2).

[POLLOCK, C.B. Assuming the judges to have rightly decided that the present plaintiff on a particular occasion was overcharged, how do you shew that the defendants will repeat the injury? How do you shew that the plaintiff will ever employ them to carry another parcel? It seems to me that there is nothing here to build your application on; neither a breach of any contract, nor an injury to property.]

It is contended that the case is within the words "other injury," in sect. 79 of the Common Law Procedure Act, 1854, and that it is one in which equity would interfere: *Story's Eq. Jurisprudence*, 6th ed. s. 959 (c). There is as much of a *continuing* element about the injury as in cases of infringement of a trade mark. In *Hodges on Railways*, 3rd ed. p. 751, it is said that "injunctions have issued to restrain a railway company from charging the plaintiff higher rates for the carriage of goods than they charged to other persons for the carriage of like goods under similar circumstances." In *The River Dun Navigation Company* v. *The North Midland Railway Company* (3), Cottenham, C., states that he concurs with Eldon, C., in holding that the court ought never to be reluctant to exercise its jurisdiction "for the purpose of keeping companies within the powers which the acts give them."

[CHANNELL, B. The writer refers the reader to p. 664, 3rd ed.,

(1) 11 C. B. 545; 21 L. J. C. P. 57. (2) 3 H. & C. 800.
(3) 1 Railw. Cas. 153.

for the authorities in support of his statement. But on looking at the cases cited there as illustrating his proposition, viz. *Finnie* v. *The Glasgow Railway Company*, (1) *Attorney-General* v. *The Birmingham and Derby Junction Railway Company*, (2) and *Branley* v. *The South Eastern Railway Company*, (3) I do not find them to bear it out.]

The principle now contended for is recognised in all these cases, although in each of them the company were held justified in the charges which they had made. As to the form of the rule for an injunction, it is similar to that in *Baxendale* v. *Great Western Railway Company*. (4)

POLLOCK, C.B. I believe that we are all of opinion that this rule ought to be discharged. I am clearly of that opinion myself; and I think that we ought to be very cautious in dealing with this power which has been conferred upon us, in cases where there can be no appeal from our decision. We have continually throughout the argument asked for an authority for interference in a similar case. But Mr. Brown has cited none. He has cited what, after all, is merely the written opinion of a learned judge and text writer, and also a variety of cases, in every one of which, however, the injunction asked for was refused. It was refused in the case of *The Attorney-General* v. *The Sheffield Gas Consumers' Company*; (5) it was refused, too, in the case of *The River Dun Navigation Company* v. *The North Midland Railway Company*, (6) where Cottenham, C., confirmed the ruling of the Vice-chancellor. There is, therefore, no ground for asking us to grant this injunction, except this, that we are told that it is a case in which we ought to make a precedent. But where, as here, there is no appeal, I think that we ought to act clearly within the limits of our jurisdiction. We sit here, it must be remembered, to administer, not what ought to be, but what is, the law.

Again, if we look into this case, we shall find that it is not true that the plaintiff has no other adequate remedy. He can recover

(1) 15 Ct. Sess. Cas. 523.
(2) 2 Railw. Cas. 124.
(3) 12 C. B. (N. S.) 63; 31 L. J. (C. P.) 286.
(4) 5 C. B. (N. S.) 356; 28 L. J. (C. P.) 84.
(5) 3 De G. M. & G. 304; 22 L. J. (Ch.) 84.
(6) 1 Railw. Cas. 153.

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his money back again, and, as I think, can recover it back with interest. The inconvenience, moreover of granting this injunction might be very considerable; and by doing so, we should not effect any advantage to the plaintiff. For if an attachment were to become necessary, in order to enforce our injunction, we should have affidavits from the plaintiff on one side, and from the defendants on the other, stating that our injunction had not or had been complied with. That would be a question we could not try upon affidavits, nor would it, in my opinion, be proper to refer it to the Master, and we should be obliged therefore to direct an issue to be tried before a jury. It is much better that the plaintiff should appeal at once to a jury, directly and not indirectly, for any infringement of his rights which he may have suffered. Under these circumstances, therefore, I am of opinion that we ought to discharge the rule.

BRAMWELL, B. I am entirely of the same opinion. The rule should, I think, be discharged on the grounds mentioned by the Lord Chief Baron. If we grant it, we must affirm a doubtful proposition of law, and must also say whether the facts of this case are within that proposition. And there would be no appeal from our decision. It would be a much better course to apply to a court whence an appeal would lie.

CHANNELL, B. I am of the same opinion. The application is made under section 79 of the Common Law Procedure Act, 1854, which was intended to give the courts of common law an equitable jurisdiction, to save expense. I am not by any means disposed to restrict that jurisdiction, but I do not think it empowers us to comply with Mr. Sutton's demand for an injunction. The section, in my judgment, applies to a class of cases differing from this one. I am rendered the more unwilling to interfere because the Court of Common Pleas, it may be, has larger powers than we have to deal with an application like the present, because the Court of Chancery has jurisdiction over the matter, and because the question of law involved is still *sub judice* in the House of Lords.

PIGOTT, B. I am of the same opinion. The Common Law Procedure Act, 1854, section 79, it seems to me, points to other matters than this. Moreover, the plaintiff has a remedy in the

Court of Common Pleas; and if we were to grant an injunction, there being no appeal from our decision, we might needlessly embarrass a large trade, and do much injustice.

Rule discharged.

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PARKER *v.* TOOTAL.

Nov. 22.

Practice—Costs—Error—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76).

The legal representative of a plaintiff in error (the plaintiff below), coming in by suggestion after the commencement of the proceedings in error, and carrying them on to judgment, under section 163 of the Common Law Procedure Act, 1852, is not, on affirmance of the judgment below, liable to the payment of the costs of the defendant in the court below.

The Common Law Procedure Act, 1852, imposes no new liability to the payment of costs.

THIS was an application for a rule directing the taxing-master to review his taxation.

The action was originally commenced in this Court as an action of ejectment, under the name of *Barrow* v. *Tootal*. It was afterwards turned into a special case, and on that the Court gave judgment for the defendant. Barrow, the sole plaintiff, then brought error, but died without having done more than enter a suggestion of error on the roll; and the present plaintiff, claiming to be his legal representative, as sole devisee of his real estate, entered a suggestion under section 163 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and continued the proceedings in error. The decision of this Court was affirmed in the Exchequer Chamber, and also on appeal in the House of Lords. (1)

Judgment had been entered in this Court and in the Exchequer Chamber for nominal sums for costs, under an agreement that the taxation should stand over till the final decision of the cause. On the parties applying to have the costs taxed, it was objected before the Master on the part of the plaintiff, that he was liable only for the costs of error, and not for the costs in this Court; and it was arranged that the costs in this Court should be taxed for the defendant *pro formâ*, in order to allow of an application to a judge at chambers for an order to review the taxation. A summons to

(1) 11 H. L. C. 142.

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review the taxation was accordingly taken out, and was heard at chambers by Martin, B., who directed that an application should be made to the Court, expressing at the same time an opinion in favour of the plaintiff's contention.

Gray, Q.C., now applied accordingly for a rule directing the Master to review the taxation: It may be taken that Parker is in the same position as if he had originally brought error himself. But he cannot be liable to costs unless the liability is imposed upon him by some statute, and the only statute imposing costs on a plaintiff in error is 8 & 9 Wm. 3, c. 11, s. 2, which subjects the plaintiff below bringing error unsuccessfully to the payment of costs in error. But this does not apply to the costs below, which were included in the judgment of the court below, given in what was, according to the old practice, a different action, and which judgment is affirmed by the Court of Error. According to the law, therefore, as it stood before the Common Law Procedure Act, 1852, a party bringing error on the death of the plaintiff below was never liable to pay the costs incurred in the court below (even if under the statute referred to he was liable for the costs of error, which it seems he was not); those costs must have been recovered against the personal representatives of the deceased plaintiff, by *scire facias* on the original judgment. This state of things was not altered by that act, for although by s. 148 error is made a step in the cause, it has been decided that it was not intended to subject the parties to any new liability, or to alter the law of costs in any way, *Fisher* v. *Bridges*, (1) *Marshall* v. *Jackson* (2).

[POLLOCK, C.B. What is the form of the judgment in the Exchequer Chamber affirming the judgment below?]

"That the judgment aforesaid be in all things affirmed, and stand in full force and effect, the said error alleged in any wise notwithstanding;" that is, the judgment below is affirmed, which was a judgment for costs against the plaintiff below, and now avails against his representatives; and since they are bound by it, there can be no reason why the plaintiff in error should be liable also. The judgment further directs that "the said defendant do recover against the said now

(1) 4 E. & B. 666; 24 L. J. (Q. B.) 165. (2) 4 E. & B. 666 (note).

claimant 400*l.* for his costs of defence in this behalf by the Court of Error now here adjudged to the said defendant;" these words must be confined to the costs in error, if in fact they are the only costs which the court has power to give.

Cleasby, Q.C., shewed cause in the first instance. The whole question turns upon sections 137, 148, and 163 of the Common Law Procedure Act, 1852. The cases cited have no application; in both the attempt was made to upset the rule that no costs are given to either party in the case of a reversal; they negative that inference from the statute, but they decide nothing as to the position of a party succeeding to the place of a deceased plaintiff. Now it is clear that, if the present plaintiff had intervened at any stage of the action before judgment, he would have been liable to the whole costs of the action, s. 137: *Benge* v. *Swaine*. (1) It is true that there is no specific provision in the sections relating to ejectment, but the rule must be the same as in other actions. If this is so throughout the course of the action below, the rule must be the same where a new party, by intervening in error, puts himself in the position of the former plaintiff; if s. 148 is to be taken in its natural sense, the whole, from the issuing of the writ to the final judgment, is now one proceeding, and the suggestion of the plaintiff's death cannot be taken as a dividing line.

[POLLOCK, C.B. On one view of the case it seems reasonable that he should be liable, for he brings error on account of an interest of his affected by the existing judgment, and which he wishes to free from its operation. On the other hand, is it reasonable that he should have to pay costs that have been incurred before his intervention in the suit, and which the defendant is entitled to recover against the personal representatives of the deceased, especially since, if he paid them, he would clearly have no action over for them?]

The court above, reversing the decision of the court below, is bound to give the same judgment as the court below ought to have given; and it accordingly decrees to the successful party the costs in the court below. (2) Suppose the Exchequer Chamber had reversed the judgment of this Court, they could not have

(1) 15 C. B. 784; 23 L. J. (C. P.) 182.

(2) Chitty's Forms (9th ed.), p. 283, and s. 157 of the C. L. P. Act, 1852.

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given costs to the executors of the deceased plaintiff below, for they were not before them.

[CHANNELL, B. Could they have given them to the plaintiff in error, who was no party to the action below, and had not incurred them? And if he could not receive them, why should he pay them? But your main difficulty lies in shewing that the liability to costs in error is altered by the Common Law Procedure Act, 1852, contrary to the doctrine of the cases cited by Mr. *Gray*. I believe the same doctrine has been held with respect to bail in error under s. 151.]

[*Gray, Q.C.*, referred to *James* v. *Cochrane*. (1)]

[PIGOTT, B.—The language of section 163 is different from that of s. 137, which provides that the judgment shall be given for or against the person making the suggestion, *as if he were the original plaintiff*.]

The general provision of s. 148 makes any such words unnecessary, and their omission is rather in the defendant's favour.

Gray, Q.C., in reply.

POLLOCK, C.B. I am satisfied that we cannot give costs unless they are expressly given by statute; and as the Common Law Procedure Act, 1852, which is relied on by the defendant, does not do so, we have no power to allow them. It is a serious difficulty in the way of the defendant's claim, that if the present plaintiff paid them, he could not recover them over against the executors of the plaintiff below. Whatever the right of the defendant may be, equitably or morally, we must decide that the present plaintiff, who has made himself a party to the cause in error after the commencement of the proceedings in error, is not legally liable to the costs incurred in the court below.

CHANNELL, B. I am of the same opinion. It is important to bear in mind that there is no right to costs at common law, and that they can only be claimed by a litigant party under some statute. How, then, would the question have stood before the Common Law Procedure Act, 1852? It is clear from *Wms. Saund.* ii. 101 (*t*), that if the plaintiff in error (the plaintiff below) had died before assigning error, the writ would have abated, and

(1) 9 Ex. 552; 23 L. J. (Ex.) 126.

the defendant must have sued out a *scire facias* against the executors before he could have recovered the costs below. The right, then, to bring error would have been reserved to those who were interested, but the executors only of the deceased plaintiff would have been liable for the costs of the action below. The statute was intended to simplify the proceedings in error, and to diminish their cost, by permitting a party to come in even after verdict and judgment, and pending the error. Now by s. 137 it is clear that if a party had come in by suggestion before verdict and carried on the cause, the proceedings would have gone on as if he had been the original plaintiff, and beyond the change of name, no notice would have been taken that he was not so. Here, however, the new plaintiff came in under s. 163, the words of which are manifestly different from those of s. 137, the words being omitted which provide that judgment shall be given for or against the person so coming in as if he were the original plaintiff, and the section only saying that "the proceedings may thereupon be continued at the suit of, and against such legal representative as the plaintiff in error." The object of this is plainly to prevent the abatement of the proceedings in error, but not to entail any new liability for costs. Two cases were cited, one, *Fisher* v. *Bridges*, (1) very much in point, the other, *Marshall* v. *Jackson*, (2) having a strong bearing on the subject, which shew that this was the object of the statute; and the case relating to bail in error, *James* v. *Cochrane*, (3) is to the same effect. An argument was presented to us by Mr. *Cleasby* accounting for the omission of the words in question on this theory: that since the Common Law Procedure Act, by the 148th section, made the proceeding to error a step in the cause, this had the effect of preventing error from being a new proceeding, and of binding it up with the former part of the cause; so that he would make the omission rather an argument in his favour, or at least not an argument against him. But this is not an inference on which we should be justified in basing a liability to pay costs where none existed before, and the rule must be absolute to review the taxation.

PIGOTT, B. This is not a very satisfactory case to deal with,

(1) 4 E. & B. 666; 24 L. J. (Q. B.) 165. (2) 4 E. & B. 460 (note.)
(3) 9 Ex. 552; 23 L. J. (Ex.) 126.

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because it depends on the nice and difficult construction of the words of an act of parliament. Mr. *Cleasby* says that as error is now a step in the cause, it is so for all purposes; but in *Fisher* v. *Bridges* (1) it was determined that the statute had no operation as regards the liability for costs. In that case there was a reversal of the judgment below; here it is affirmed; but in substance the cases are the same, and that case was decided on principles that determine the present one. I agree with what my Brother Channell has said as to the construction of the sections relied on, that we cannot attach to their provisions the inference of a new liability imposed on the party coming in by suggestion. If the legislature had intended to alter the rule as to costs, and to make the old costs a burden which the new party must assume as the condition of his continuing the proceedings, they would have said so, and not have left us to find out their intention from such obscure indications. I cannot therefore say that the taxation of these costs against the present plaintiff is right, and the rule must be made absolute.

MARTIN, B., concurred.

Rule absolute.

Nov. 25.

SMITH AND ANOTHER *v.* RIDGWAY.

Will—Construction—Appurtenances.

The testator was seised in fee of two manufactories at H., one on the east and the other on the west side of the High Street. The latter was worth one-half as much as the former. At the time of his death they were, and for thirty years previously had been, jointly occupied and jointly used by his tenants, at a single rent, for the purposes of earthenware manufacture. They were, however, capable of being separately used, if certain alterations were made. By his will, the testator devised all his real estate to trustees for sale, and, by a codicil, his "messuages, manufactory, &c., on the west side of High Street, in the occupation of R. and A. and others, together with all rights and appurtenances to them belonging," to A. and W. R. and A. were the then occupiers of both the manufactories on the east and west sides:—

Held, that the manufactory on the east side did not pass, under the codicil, to A. and W. as appurtenant to that on the west side; inasmuch as, although they had in fact been used, and rented together for a long period, they were capable of being used separately.

THIS was an action for rent in arrear. The first count of the declaration stated that Joseph Mayer, since deceased, being seised

(1) 4 E. & B. 666; 24 L. J. (Q. B.) 165.

in fee of a certain manufactory, lands, buildings, and premises, and also of a certain other manufactory, &c., demised the same to Leonard James Abington, and the defendant, as tenants from year to year, at the rent of 10*l.* a week, and they thereupon became tenants of the manufactories upon those terms: that Joseph Mayer died on the 28th of June, A.D. 1860, having devised by his last will the first-mentioned manufactory, &c., to the plaintiffs and L. J. Abington, being such tenant as aforesaid, and their heirs: that the defendant and L. J. Abington, under the said demise and will, continued tenants to the plaintiffs in respect of two undivided thirds of the first-mentioned manufactory, &c., and so continued, until and at the time of the accruing due of the rent now sued for, being the sum of 226*l.* 13*s.* 4*d.*, due and owing to the plaintiffs in respect of two-thirds of such portion of the rent as ought to be apportioned to the plaintiffs as to the first manufactory, &c., for 102 weeks, which had elapsed since the death of Joseph Mayer, and before action: that the plaintiffs had performed all things necessary, &c.; yet the defendants did not nor would pay the sum so due as aforesaid. The second count was for money payable for use and occupation of the same premises, and for money due on accounts stated.

The defendant, amongst other pleas, traversed the demise, and the devise of Joseph Mayer alleged in the first count, and also the tenancy of himself and Abington upon the terms therein alleged.

It appeared, upon the trial before Bramwell B., at the Lancashire Summer Assizes, 1865, that the testator, Joseph Mayer, was the owner of two earthenware manufactories in High Street, Hanley, Staffordshire, one on the east side and the other on the west side of the street. From 1830 down to the time of bringing this action they had been used together, at first by the defendant's father, and afterwards, from the year 1848, by the defendant and Leonard James Abington, who occupied the premises jointly as tenants from year to year, paying one rent for the whole, and using them together as partners for the purpose of the manufacture of earthenware. Mayer, by his will, dated the 23rd of April, 1860, devised all his real estate to Abington, Smith, and Goddard the plaintiffs, upon trust for sale, and by a codicil, dated the 26th

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of June following, he made a specific devise to Leonard James Abington and Abner Wedgwood, in the following terms:—

"I give and devise my messuages, cottages, manufactory, and land on the west side of High Street, in Hanley aforesaid, in the occupation of Ridgway and Abington, and others . . . . together with the stables, warehouses, out-buildings, yards, gardens, and all other rights, members, and *appurtenances* to the said messuages or tenements, lands and hereditaments, belonging or appertaining, unto my friends, Leonard James Abington and Abner Wedgwood, absolutely as tenants in common."

At the time of Mayer's death the partnership between Abington and Ridgway, the defendant, was subsisting, but soon afterwards it was dissolved, and the defendant, by arrangement with Abington, continued in sole occupation of the premises on both sides of the High Street. The value of the premises on the west side was one-half more than the value of the premises on the east side. It was proved that, although the two manufactories had long been occupied and used together, they had formerly been and still were, by alterations, capable of being, used separately; but that, during the joint occupation of them, a chimney attached to the manufactory on the east side had fallen into decay, and in consequence the premises on that side could not, without some expense being incurred, be made available separately and alone for the manufacture of earthenware.

The only question between the parties was, whether the action was rightly brought by the plaintiffs, or whether it should have been brought by the devisees under the codicil.

A verdict was entered for the plaintiffs, and leave was reserved to the defendant to move to enter a non-suit, on the ground that by the will and codicil of the testator the property did not vest in the present plaintiffs, and that they were therefore not entitled to maintain the action. It had not been thought proper, assuming that the devisees in trust under the will were the right plaintiffs, to join Abington (see *Badeley* v. *Vigurs*), (1) in the present action for the proportion of the rent due to the plaintiffs.

Quain (Nov. 2nd) obtained a rule *nisi*, pursuant to the leave reserved, against which

(1) 4 E. & B. 71; 23 L. J. (Q. B.) 377.

Milward, Q.C. and *Baylis* (Nov. 24) shewed cause. The specific devise in the codicil could only pass the manufactory on the west side; and the manufactory on the east side, in respect of which alone rent is sued for, did not pass under the word "appurtenances," or any other of the general words used, inasmuch as it was capable of being separately used, and was in itself worth one-half as much as that on the west side. It therefore passed under the general devise in the will to the present plaintiffs.

W. H. Terrell and *Quain* in support of the rule. The clause in the codicil carries both manufactories. They were used together when the will and codicil were made, and at the testator's death, and had been so used for thirty years. Moreover they could not be used separately without alteration, and without expense being incurred. The manufactory on the east side, therefore, being necessary to the convenient occupation of that on the west, passed as "appurtenant" to it. *Boocher* v. *Samford,* (1) *Ongley* v. *Chambers,* (2) *Jarman on Wills,* 3rd Ed. vol. i. p. 742. The words of substantive description in the codicil, it is contended, are "the manufactory, &c., *in the occupation of* Ridgway, Abington, and others, together with the appurtenances." Now these persons occupied both manufactories, and the words "on the west side of the High Street," must be considered as *falsa demonstratio. Griffiths* v. *Penson,* (3) *Goodtitle* v. *Southern.* (4) The testator's intention could not have been to pass one manufactory under the general devise for sale, and the other under the codicil, both manufactories having been for so long a period worked, rented, and occupied together.

[POLLOCK, C.B. Whatever may have been the intention of the testator as to his estate in these premises, if he uses words incapable of passing them, it must be held that they do not pass.]

The words of description used here are sufficient to give effect to his intention, and they ought not to be restrained by the words of locality.

Cur. adv. vult.

(1) Cro. Eliz. 131.
(2) 1 Bing. 483.
(3) 11 W. R. 313.
(4) 1 M. & S. 209.

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Nov. 25.—The judgment of the Court (Pollock, C. B., and Martin, Channell, and Pigott, BB.) was delivered by

POLLOCK, C. B. In this case, argued before us yesterday, the question was upon the construction of a will. The testator, it appeared, had a manufactory on the west side of a certain street in Hanley, and another manufactory on the east side. The two manufactories were distinct, capable of being separately occupied and separately used. But for many years they had, in point of fact, been occupied together by one person as tenant. During this joint occupation of them, a chimney attached to the manufactory on the east side was suffered to fall into decay, so that the premises on that side could not be any longer used alone as a manufactory. It seems that the manufactory on the east side was one-half of the value of that on the west. That being so, the testator bequeathed to two persons named his "manufactory and land on the west side of High Street, in Hanley, in the occupation of Ridgway and Abington and others, ... together with the . . . appurtenances" thereunto belonging. Now, there is no necessary connection between the two manufactories, nor are they premises of a similar description to those in the case cited by Mr. Terrell, where certain lands were held to be appurtenant to a rectory (*Ongley* v. *Chambers*). (1) We are of opinion, therefore—this being not so much a question of "parcel or no parcel," as of construction—that under the words used nothing passed but the manufactory on the west side of the street; and that unless the adjoining manufactory on the east side, being one-half the value of that on the west side, passes by the word "appurtenances," the plaintiffs are entitled to recover. But, in our opinion, the manufactory on the east side cannot pass as appurtenant to that on the west. The verdict, therefore, must stand; but as the point was reserved at the trial, the defendant may appeal from our decision.

Rule discharged.

(1) 1 Bing. 483.

BOOTH *v.* TAYLOR.

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Practice—Pleading—Injunction, 17 & 18 *Vict. c.* 125.

A claim of a writ of injunction cannot be pleaded to.

In this action, the plaintiff as reversioner, sued for damages on account of erections made by the defendant, which caused obstruction to certain ancient lights in the possession of tenants of the plaintiff; and by the endorsement on the writ, and by the declaration, he claimed a writ of injunction, "to restrain the defendant from the continuance and repetition of the injuries above complained of, and the committal of other injuries of a like kind relating to the same right."

The defendant pleaded, fourthly, upon equitable grounds, to the claim for a writ of injunction, "except so far as the same relates to the committal of the other injuries of a like kind relating to the same right," that after the obstructions in question were erected, he demised portions of the premises to tenants, for terms not yet determined, so that he was unable to prevent the continuance and repetition of the injuries mentioned in the declaration, and would be unable to obey the writ, as to the portions of the buildings demised; and the plea stated that he had removed the obstruction, so far as it was caused by the residue of the buildings.

The plaintiff having taken out a summons before Martin, B., at chambers, to shew cause why the plea should not be struck out; the learned judge refused to make the order, but gave leave to appeal, and Barstow having obtained a rule to shew cause, it now came on to be argued.

The only question raised was whether the claim of a writ of injunction in the declaration could be pleaded to, and no point was made as to the validity of the plea, supposing a plea admissible at all.

The following sections of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), were chiefly relied on:—

By section 79 (relating to injunctions), the plaintiff in any action may, "in like case and manner as hereinbefore provided

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with respect to mandamus," claim a writ of injunction. By section 80, the writ is to be indorsed with a notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

By section 81, "The proceedings in such action shall be the same as nearly as may be and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action, judgment may be given that the writ of injunction do or do not issue, as justice may require."

By section 82, the plaintiff may "at any time after the commencement of the action, and whether before or after judgment," apply *ex parte* to the court or a judge for a writ of injunction.

By section 68 (relating to mandamus), the plaintiff may indorse on the writ and copy to be served, a notice that he intends to claim a writ of mandamus, and may thereupon claim the mandamus in the declaration. By section 70, the proceedings in a mandamus action are to be the same as in an ordinary action for the recovery of damages; and by section 71 "In case judgment shall be given to the plaintiff that a writ of mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, beside issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced."

Kemplay shewed cause, and cited *Bilke* v. *The London, Chatham, and Dover Railway Company*, (1) in which it was held that a demurrer to such a claim might under some circumstances be good; and contended that if the matter was capable of being dealt with by demurrer, it must also be capable of being dealt with by plea; it must be allowable to state, in a plea, those circumstances which, if they appeared in the declaration, would make it demurrable as to the claim for an injunction.

[CHANNELL, B. The case cited only goes to this extent, that there is a certain class of cases which are fit for the issuing of an

(1) 3 H. & C. 95. 33 L. J. (Ex.) 206.

injunction, and that if the declaration does not shew such a case the claim of a writ is plainly bad and informal. But supposing the judgment to go for the writ, how are you injured? It cannot be enforced except by applying to the court by motion on affidavits, to issue the writ, and then you can state whatever reasons you have to shew why it should not issue.]

But here facts are shewn which negative the right of an injunction altogether, and prevent the judgment from being given.

[POLLOCK, C. B. In every case when *primâ facie* an injunction ought to go, there may be circumstances making it improper that it should go, and those circumstances vary from time to time, and, if they exist when the writ is asked for, will form an answer to the application. It is not to be assumed that judgment for the injunction will follow as a matter of course upon the judgment for damages and costs; the 81st section says the "judgment may be given that the writ of injunction do or do not issue as justice may require."]

It may be important to displace the plaintiff's right to ask for an *ex parte* injunction under section 82.

Barstow, in support of the rule, was stopped.

POLLOCK, C. B. My view of the statute is that the claim for a writ of injunction which is made by the writ and in the declaration, is merely a preliminary formality to enable the plaintiff to ask for an injunction at the proper time; and, until he does so ask, no judgment for an injunction can be given; for the successful plaintiff is not entitled to it as a matter of course. The plea is therefore not called for, and must be struck out.

BRAMWELL, B. I quite agree, and certainly do not think that anything that was said in the case cited by Mr. Kemplay will assist him.

CHANNELL, B. I am of the same opinion. If the effect of this decision were to deprive the defendant of his right to use any defence which he has against the claim of an injunction, I should think otherwise; but in truth the reason why it is not matter for a plea is, that in the present state of the action the question has not arisen, and it may never arise. The proceedings in the action are entirely divisible, but in order to entitle the plaintiff to apply for

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an injunction he must give notice of his intention by incorporating his claim in the writ and declaration.

PIGOTT, B. I am of the same opinion. To allow such a plea would open the door to raising expensive issues of fact on a matter that may never require to be decided.

Rule absolute.

Nov. 25.

IN RE THE SHEFFIELD WATERWORKS ACT, 1864.
COLLIS' CLAIM.
WRAITHBY'S CLAIM.

Costs (taxation of)—Officers of Court.

In a private Act, constituting a body of commissioners for settling claims against a company, it was provided that they might give certificates for costs, and that in case of difference such costs should, on the application of either party, be "taxed and settled by a Master of a Superior Court of Law at Westminster," according to the rules, and on payment of the fees observed and paid in actions at law, and that, on production of the certificate, judgment for the amount might be entered up and execution issued thereon. A master of this Court having taxed costs accordingly:—

Held, that, under this provision, the masters taxed as *personæ designatæ*, and not as officers of the Court, and that the Court had no jurisdiction to review their taxation.

THESE were rules calling on the claimants in the respective cases to shew cause why the Master should not review his taxation.

The cases arose under the Act passed to provide for the assessment of compensation claimed against the *Sheffield Waterworks Company* for damage caused by the bursting of their reservoir in March, 1864. The Act (27 & 28 Vict. c. 324), passed 29th July, 1864, appointed a body of commissioners (s. 6), to whom all claims against the company were to be referred, the company admitting negligence (ss. 40, 41, 87, 88.) The claims were to be determined by them within nine months after the passing of the act (s. 58); and within one month after the expiration of that period, they were to make a general certificate of damages (s. 59), which was to be deposited with the town-clerk of Sheffield (s. 62). Their proceedings and acts were not to be liable to be interfered with by any court of law or equity, by way of certiorari, prohibition, or injunction; and their general certificate was to be evidence

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of the right to the damages specified therein, and to be unimpeachable on any account whatever (s. 60). The commissioners and their clerk were to continue to act for three months after making their certificate, and their powers were then to cease (s. 64). The company was to pay the amounts certified within three months after the making of the certificate, with interest from the date of determination, after which time the general certificate was, as to the several amounts of damages certified and interest, to have the effect of judgments recovered in one of the superior courts of law at Westminster and registered (s. 65); with power, in case of non-payment, to enter up judgment and issue execution, on the production of a certified extract from the general certificate (s. 69).

By s. 66, the mode in which the cost of proceedings relative to claims were to be borne and paid was regulated, and by s. 67, such costs were to be due and payable at the expiration of six months after the making of the general certificate, "provided that all such costs shall, in case of difference, be taxed and settled on production of a certificate of the commissioners, by a master of a superior court of law at Westminster (on the principle and according to the rules and on payment of the fees observed and paid on the taxation and settlement of costs in actions at law), if application for such taxation and settlement is made by either party within the last-mentioned period of six months; but in case of difference, any such costs shall not be payable at any time unless they are so taxed and settled." On non-payment of costs payable under the act, within twenty-eight days after a demand in writing, the certificate of the commissioners was to have the effect of a judgment, under provisions similar to those relating to the certificate for damages (s. 68), and with a similar power of entering up judgment and issuing execution (s. 70).

The claims had been adjusted, and the certificate made out and sealed, and the powers of the commissioners had ceased. The claimants, whose names appeared in the general certificate, had also obtained certificates for costs, and their bills of costs had been taxed by one of the masters of this Court on the application of the company; but the company being dissatisfied with the taxation, *Pickering, Q.C.*, had in this term obtained these rules on their behalf.

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Manisty, Q.C. and *Shepherd* shewed cause. The whole matter is alien from the jurisdiction of this Court, and the purpose of the act is to make every decision in the first instance final. *In re Ross* v. *The York, Newcastle, and Berwick Railway Company*, (1) a similar question arose under s. 52 of the Lands Clauses Consolidation Act, 1845, and the decision supports this view.

The Court then called upon

Pickering, Q.C., *Mellish, Q.C.*, and *Quain*, to support the rules. It was evidently intended, by referring the costs to the masters of the courts, to put parties under the protection of the court. The present case differs in this respect from the one cited; for there it was not an officer of the court whose decision was appealed against. Here, on the contrary, the costs are referred to the officers of the court, who are directed to tax them according to the ordinary rules of taxation, and of these rules the court is guardian.

[POLLOCK, C.B. If costs are given on a rule, they are included in the rule; if in an action, they are included in the judgment. But we do not give any costs here, but they become due by the commissioners' certificate. We know our own proceedings; but what means have we of knowing what takes place before the commissioners?]

A decision against us will place the decision in the hands of each master separately, without providing any means of bringing their rules of taxation into conformity with one another. Either party may apply for taxation, and (if both do not apply simultaneously to different masters, which raises another difficulty) the party applying will select the master whose views are known to be most favourable; or if they cannot select the master, but only the court, and must take the master in the ordinary rotation, this shews that the masters tax as officers of the court. If, again, the masters tax as private individuals, they, and not the Treasury, will be entitled to the fees, which will be an unexpected, though not a disagreeable, result to them. It will be difficult to describe the nature of their jurisdiction. If it is an award, we can only review it by making it a rule of court and moving to set it aside; and if a master on being applied to refuses to tax, we can only compel him to do so by a mandamus from the court of Queen's Bench.

(1) 5 Rail. Ca. 516; 5 D. & L. 695.

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RE SHEFFIELD WATERWORKS ACT, 1864.

POLLOCK, C.B. This rule must be discharged. I do not say the taxing master's decision is an award. He is a person appointed by the legislature to perform a certain duty, and rather resembles an appraiser called in by the parties to settle a claim. But whatever his precise character may be, we cannot interfere with his decision. It appears to me that if the legislature had intended that we should review this taxation of costs, incurred in a matter wholly without our jurisdiction, they would have said so expressly, and we should probably have received some previous intimation from the Government of what was intended, and an inquiry whether we had leisure to discharge the duty, as is usually the case when new duties are imposed upon the judges. There is no such direction in the act, and we cannot, therefore, interfere.

BRAMWELL, B. I am very clearly of the same opinion. It lies on those who invoke the exercise of our jurisdiction to shew that we possess it, and this they have failed to shew. In the ordinary cases of a rule or action the court in its judgment awards the costs, and its officers are directed to ascertain the amount; from their decision an appeal lies to the court, because it was the judgment of the court which awarded the costs in the first instance. But here there is no judgment or award of the court, and, therefore, no foundation for the appellate jurisdiction. Another reason against the application is, that by s. 67, the costs are, in case of difference, to be taxed and settled, not by the master of any particular court, but by "a master of a superior court of law at Westminster." You might go to any court you please, and the masters there might say, "We are too much engaged with our regular duties; we have no time to attend to the matter; go elsewhere:" and a master so refusing to tax would not incur any legal consequences; he would not be liable to an indictment for not performing a statutory duty. The parties, then, are at liberty to go to any one of the masters. The masters are merely twelve designated persons, not acting as officers of any court, and we have no more jurisdiction to entertain an appeal from a master of this court than from a master of the Queen's Bench.

CHANNELL and PIGOTT, BB., concurred.

Rules discharged.

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Nov. 13.

STANGER *v.* MILLER.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134)—*Composition Deed—Registration.*

A composition deed under the Bankruptcy Act, 1861, so far as its operation depends on the act, takes effect, for all purposes, from the date of registration, not of execution:—

Held, therefore, that rent, which accrued due from the insolvent to the defendant after the execution but before the registration of a trust deed, might be set off in an action, brought against the defendant by the trustees for a debt due from him to the insolvent.

Held, also, that the proportion of rent which, under section 150 of the Bankruptcy Act, 1861, would be proveable in bankruptcy, may be set off as a mutual credit, under section 171 of 12 & 13 Vict. c. 106, in an action brought against the landlord by assignees in bankruptcy or trustees of a composition deed.

Semble, by *Bramwell*, *B.*, that the liability to the rent was a liability to pay money on a contingency within section 178 of 12 & 13 Vict. c. 106, and as such a subject of set-off.

THIS was an action brought by the plaintiffs as trustees of a trust deed, executed by one John Bowles, under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134; and the 5th count of the declaration was for money due from the defendant to Bowles, at the time of executing the trust deed, for goods bargained and sold, goods sold and delivered and on accounts stated.

To this count the defendant pleaded on equitable grounds, as to 37*l.* 10*s.*, parcel of the money claimed, that Bowles was his tenant, and that a quarter's rent amounting to that sum became due on the 24th of December, 1864; and that "the said John Bowles, before and at the time of the registration of the said deed or instrument in the declaration mentioned, and before the defendant had any notice or knowledge of the said deed or instrument, or of any act of bankruptcy committed by the said John Bowles, and until and at the commencement of this suit, was and still is indebted to the defendant in an amount equal to that part of the plaintiff's claim to which this plea is pleaded, for the said quarter's rent which became due and payable as aforesaid on the said 24th December, 1864, which amount the defendant is willing to set off against that part of the plaintiff's claim to which this plea is pleaded."

Demurrer and joinder.

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Patchett, in support of the demurrer. The set-off is claimed in respect of rent which became due before the registration of the deed, but, as it must be assumed on the pleadings, after its execution. First, the date of execution is the date which fixes the rights of all parties, the effect of the registration relating back to that time. If the opposite view is adopted, it gives an opportunity for defrauding both the former creditors, who assented to the deed on a view of the existing debts and assets and who may find new debts added, and also other persons, who between execution and registration may, in ignorance of it, have given credit to the debtor *bonâ fide*, and then find that they are already bound by the deed. In *Symons* v. *George*, (1) there is a dictum by Crompton, J., in favour of this view.

[CHANNELL, B. That case turned entirely on the passing of the property comprised in the deed by its operation at common law.]

It will follow, then, that the debtor may, between execution and registration, acquire property on credit, which he will hold for himself, free from any liability; since the vendor's claim will be barred by the deed, and at the same time, the property not passing by the deed, neither the vendor nor any of the other creditors can derive any benefit from it as assets. Secondly, assuming that the date of execution is to be taken, there was no debt then due to the defendant, and there can therefore be no set-off. The rights of the insolvent vested in the trustees of the deed, as from the date of its execution, by virtue of the subsequent registration under the act, but the debt which accrued afterwards was due, not from the trustees, but from the insolvent; the debts are not therefore between the same parties, and cannot be set off against one another, *Isberg* v. *Bowden* (2).

[BRAMWELL, B. If that case were applicable here, it would prove that there never could be a set-off between the trustees and the debtor of the insolvent, which is clearly otherwise. But further, the trustees must stand in the same position as assignees in bankruptcy, and as against them, would there not be a good mutual credit under the bankruptcy acts?]

(1) 34 L. J. (Ex.) 187. (2) 8 Ex. 852, 858; 22 L. J. (Ex.) 322.

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There could be no mutual credit under 12 and 13 Vict. c. 106, s. 171, because there is no "debt or demand" until the day on which the rent is made payable; for it is not a claim accruing *de die in diem*, but the whole becomes due at once, on the arrival of the appointed day. It has never been attempted to apply this term to a debt arising on the demise of land; nor is the aid of the section required, for the landlord has his remedy by distress. The Bankruptcy Act, 1861, s. 150, admits him to prove for a proportional part up to the day of adjudication, and if his rights here are the same, he can claim, but only for rent up to the date of the deed; but he could not in either case plead this as a set-off, for the exception introduced by that clause in his favour must be limited to the express provisions of the act. The introduction of this provision, however, shows that the case was not included in the previous act.

[CHANNEL, B. The defendant may very well be said to have credited the insolvent with the use of the house, and this would be a credit ending in a debt, and so within the cases on mutual credit; and the provision of the act of 1861 is not superfluous, because the earlier statute only gave a right of set-off, not of proof.]

Keane, Q.C., in support of the plea. The rights of the defendant must be the same as if the debtor had become bankrupt; by s. 197 of the Bankruptcy Act, 1861, it is provided that the court of bankruptcy shall have jurisdiction over trust deeds, and that, "except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed, according to the law and practice in bankruptcy, so far as they may be applicable." It is clear, therefore, that, taking advantage of the 150th section, the defendant might have proved for the proportion of rent up to the day of execution; he might therefore have set off that amount, and paid money into court for the residue. But the real question is, whether it is the date of the execution or of the registration of the deed which determines the rights of the parties. The defendant contends that it is the official date; that of which a memorandum is by s. 196 to be written by the registrar on the face of the deed, at the time of the registration. Until that time, the deed was inoperative, and the trustees could not have sued

for debt; but if the insolvent had sued, and the defendant had pleaded a set-off of this debt, the insolvent could not have replied that he was suing on behalf of the trustees, for, as the plea states, the defendant had no notice of the assignment of the debt. *Buck* v. *Lee.* (1) If the opposite proposition were correct it would lead to great inconveniences; for if where a deed assigns debts, as here, the force of the statute transfers them to the trustees as from the date of the execution, what is the position of a person *bonâ fide* paying a debt to the insolvent between the two dates? The execution is a fact of which no one has notice, and which is entirely the act of the insolvent, and it would be unreasonable to suppose that this should be the event by reference to which rights should be fixed under a deed, that might not be registered, and therefore not become operative, for twenty-eight days, or "such further time as the Court in London shall, under s. 194, allow." He also referred to *ex parte Harrison re Lawford,* (2) and s. 199 of the Bankruptcy Act, 1861.

Patchett, in reply. The rights of the trustees under the deed take effect immediately on its execution, and they might bring an action before registration.

[POLLOCK, C.B. Can you produce any instance in which the court has upheld the acts of trustees done before registration? No doubt where property is transferred by the deed they might recover possession of it in an action, because, as in *Symons* v. *George,* (3) the property would pass by the deed at common law; but it is a mistake to suppose that it would avail to transfer debts before registration.]

Under s. 194, the effect of non-registration is confined to making the deed inadmissible in evidence, and a plea of non-registration would not be a good plea.

[POLLOCK, C.B. No; because registration would be part of the plaintiff's case, and he must prove it. But when s. 194 says that, in default of registration the deed shall not be receivable in evidence, it does not exhaust the whole effects of non-registration; s. 197 says that "from and after registration," certain things shall happen, which implies that until registration those things do not happen.]

(1) 1 Ad. & E. 804. (2) 26 L. J. (Bkcy.) 30. (3) 34 L. J. (Ex.) 187.

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He also referred to the 7th condition of s. 192 of the Bankruptcy Act, 1861, providing for delivery of possession to the trustees immediately upon the execution of the deed.

POLLOCK, C.B. We are all of opinion that this plea is good. This is a claim by trustees of a deed under the Bankruptcy Act, 1861, for a debt due to the insolvent; which is a right that does not pass by the execution of the deed, but vests only on registration under an act of parliament, the provisions of which then give to the deed the effect of an adjudication in bankruptcy. The defendant pleads a set-off for rent, and it is objected that the rent under the demise did not become due till after the execution of the deed, and that that date is to be taken as corresponding to the adjudication in bankruptcy. But, as I think, registration is to be taken as the event which fixes the rights of the parties, and the date of registration as the time corresponding to the adjudication in bankruptcy. On that footing, there would be no doubt that this rent which accrued due before registration, is a good set-off, but even if the date of execution were taken, the claim would still be maintainable. The 150th section of the act of 1861 gives the landlord power to prove under a bankruptcy for the proportion of rent due up to the moment of adjudication, and thus, in effect, provides that his rights shall be the same as if the rent accrued from day to day. Now a deed under the act of 1861, has, when registered, the operation of an adjudication in bankruptcy, and therefore the landlord has, under this deed a proveable claim against the trustees, which he may therefore set off in an action brought against him by them.

3 C P 599

BRAMWELL, B. I think the plea is quite right. The proper way to consider the question is to see how the matter would stand, if, instead of a deed, there had been an adjudication in bankruptcy, I will assume for the present the date of execution to be the period corresponding to that event. Even then this would, I think, have been a good plea of mutual credit under the bankruptcy acts, although not a good set off within 2 Geo. 2, c. 22. Speaking generally, the effect of s. 171 of the act of 1849 relating to mutual debts and credits is, that whatever can be proved in bankruptcy, can also be set off in an action brought by the assignees against the creditor. Now it is plain that, under

s. 150 of the act of 1861, the defendant could have proved for the proportion of rent up to the day of adjudication. But, further, since under the contract of demise the rent would become due after the bankruptcy, if the estate continued, though not payable at that time, I think that, although not a debt payable on a contingency under s. 177 of 12 & 13 Vict. c. 106, it might be a liability to pay money on a contingency within s. 178 of the same statute. In either case, it would have been a mutual credit, and therefore a subject of set-off in bankruptcy; but if so, it is clear that it is a subject of set-off here, for the trustees cannot be in a better position than if they had been assignees in bankruptcy. Therefore, whether you take the date of the execution of the deed, or that of its registration, as the point of time answering to an adjudication, the defendant is entitled to succeed, if this view is correct.

But he is also entitled to succeed on the ground stated in the argument, that we are to look at the registration as the date with reference to which everything is to be considered; although, as in every other question arising under this act, difficulties occur in this construction. The 194th section applies to all deeds executed by a person not a bankrupt, for the benefit of his creditors, or for his own discharge from liability, and they are all to be registered within twenty-eight days after their execution by the debtor; and by s. 197, the provisions of bankruptcy then come into operation. We must read this section as applicable as well to deeds binding those who are parties to them, as to those which bind other persons not parties. Now it is impossible to say that a deed executed on a given day, not announced to the world, but kept in the debtor's pocket, should, on being registered, have a retrospective effect given to it, carrying back its operation twenty-eight days, or for such further time as the Court of Bankruptcy may, under s. 194, allow for its registration. The deed becomes an official document at the time when it has an official sanction given to it by registration, and this is the point of time which we are to consider as that which fixes the rights of the parties concerned. The defendant therefore, having a debt which had already become due before the date of the registration, had a debt which is a subject of set-off as a mutual debt.

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CHANNELL, B. I also think the plea is good, and that our judgment must be for the defendant. The trustees are in the same position as assignees in bankruptcy, and under the plea the defendant must succeed, if he shows a mutual credit. Now here, at the execution of the deed, a portion of the rent was payable though only by virtue of the statute, which assimilates the demand to one accruing *de die in diem* for the purpose of proof against a bankrupt estate. This therefore was a proveable demand, and therefore a good set-off under this equitable plea. But also, what is now set-off was, by the terms of the demise, not only due by the contract, but was actually payable in point of time before the date of registration. Either, therefore, as a mutual debt or a mutual credit, the plea shows a good answer; but I am of opinion that there was an actual debt to be set off, for I consider registration to be the dividing line. We were referred to the 7th condition of s. 192, as opposed to this interpretation; but I do not so understand it, for, consistently with it, that condition has its proper effect. The statute makes a clear distinction between execution and registration; it is registration which gives effect to the deed by making the rights and proceedings under it similar to those in bankruptcy; but, for some purposes, the deed may have effect from the date of execution, so as to enable the trustees to take possession of the property comprised in it; and this purpose is served by the clause of the act referred to. Nor have the concluding words of s. 194, relating to evidence, the effect which Mr. Patchett ascribes to them. The deed must be given in evidence by the trustees to maintain their rights, and this provision, to secure registration and to protect against the use of an invalid deed, cannot prove that the deed has validity for other purposes before registration. The case seems to me a tolerably clear one, and I entertain no doubt that our judgment should be for the defendant.

PIGOTT, B., concurred, for the reasons given by the rest of the Court.

Judgment for the defendant.

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Dec. 5.

Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—*Deed under Section* 192—*Unreasonable conditions—Reservation of rights against Sureties—Release—Delivery of possession.*

A deed under Section 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), is valid, 1. although it unconditionally releases the debtor, in consideration only of a covenant to pay a composition partly secured by suretyship, and of the assignment of property next mentioned; 2. although it contains an assignment of the debtor's property, coupled with a condition that the debtor shall remain in possession with the power of disposing of the property, until default is made in payment of the composition; 3. although it has no clause reserving rights against sureties, unless it is shewn that these are creditors secured by sureties.

DECLARATION for goods bargained and sold, goods sold and delivered, and money due on accounts stated.

Plea by way of equitable defence, that the defendant was indebted to the plaintiff and divers other persons, and that, "after the commencement of this suit, and when the defendant was indebted as aforesaid," he executed a deed under the Bankruptcy Act, 1861.

The plea set out the deed, which was made between the debtor of the first part; E. W. Genever, a trustee, of the second part; and all the creditors of the defendant of the third part; and by it the defendant covenanted with the trustees, and with all his creditors, that he would pay to all his creditors a composition of 5*s.* in the pound upon their several and respective debts, "in the proportions, at the times, and in manner hereinafter mentioned, that is to say, 2*s.* 6*d.* upon or immediately after the day of the date of the registration of these presents, and the remaining 2*s.* 6*d.* in the pound at the expiration of three calendar months from the time of such registration as aforesaid; the last of such instalments to be secured by the promissory note of the debtor and of Henry Barratt, bearing date, and to be delivered to the said creditors, on the day of the date of the registration hereof." The debtor also conveyed and assigned all his estate real and personal to the trustees absolutely; "provided, nevertheless, that until default shall be made in payment of the said composition, or either of the instalments thereof, in pursuance of the covenant of the debtor hereinbefore contained, it shall be lawful for the said debtor, his executors, administra-

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tors, and assigns, to hold and peaceably enjoy the real and personal estate and effects hereby conveyed and assigned, or intended so to be, and to use and deal with the same, and also to carry on his trade as a tailor and draper, without any interruption or disturbance of or from the said E. W. Genever, or by any of his creditors;" but an inventory of the estate and effects of the debtor at the time of the execution of the deed was to be taken by the trustee, who was also to be at liberty, during the continuance of the deed, to enter the debtor's premises, and inspect his effects, and report to the creditors; and in case default should be made in payment of the composition, or either of the instalments, it should be lawful for the trustee to apply and administer the debtor's estate and effects for the benefit of the creditors, in like manner as if the debtor had been duly adjudged bankrupt. And, "in consideration of the covenant and assignment hereby made by the debtor as aforesaid," the creditors released the debtor from all debts, and from all actions, suits, judgments, &c., in respect thereof.

The plea then averred the performance of the statutory conditions, and in particular that, "immediately on the execution of the deed by the defendant, possession of all the property comprised therein, of which the defendant could give or order possession, was given to the said E. W. Genever;" that the plaintiff was bound by the deed in respect of his present claim; that the defendant had "always been ready and willing to pay the first instalment of 2*s.* 6*d.* in the pound on the amount of the plaintiff's debt, and to give the plaintiff the promissory note of himself and the said Henry Barratt, for the amount of the second of the said instalments, bearing date the day of the said registration, and payable to the plaintiff three months after date; and he now brings into court the sum of 5*l.* 18*s.* 6*d.*, being the full amount of the said instalment, ready to be paid to the plaintiff; and before pleading this plea he tendered to the plaintiff the amount of the said first instalment and the said promissory note."

Demurrer and joinder.

Macnamara (Nov. 15), in support of the demurrer. (1) The

(1) Some discussion arose upon the form of the plea, but it was agreed that it was a good plea to the further maintenance of the action under s. 68 of the

deed is open to three objections. First, there is no delivery of possession of the property comprised in it; secondly, there is no reservation of rights against sureties; thirdly, either the release is conditional on payment of the composition, and the plea bad for not shewing the performance of the condition, or, if it be absolute, the deed is unreasonable, because it gives no adequate consideration to the creditors for their release.

As to the first objection, the deed contains a present and immediate assignment to the trustee: but by the terms of the deed, the debtor is to remain in possession till default in payment of the composition, and whilst he is in possession he is allowed an absolute power of dealing with the whole property. The delivery of possession, therefore, alleged by the plea is merely illusory, and is not such a delivery as is contemplated by the seventh condition of section 192 of the Bankruptcy Act, 1861, which provides that, "immediately on the execution of the deed by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

[He was then stopped by the Court.]

Henry James, in support of the plea. First, the omission of a clause reserving rights against sureties cannot be material, until it is shewn that there are sureties a creditor's rights against whom will be affected by its absence. Secondly, the release is evidently not conditional, but absolute, being expressed to be made in consideration of the covenant and agreement; the case is, therefore, not within *Fessard* v. *Mugnier*. (1) Neither is the deed unreasonable, although the debtor only gives his covenant in return for the release. The principle now adopted by the courts is, to leave the creditors to determine what is for their interest, and to interfere only when the deed makes an inequality between them. In *Keyes* v. *Elkins* (2) a deed was upheld, in which the debtor's covenant to pay a composition was the only consideration given to the creditors for an absolute release, or a covenant not to sue, which is for this purpose equivalent to a release. Thirdly, the provision as to the

Common Law Procedure Act, 1852. In Garrod *v.* Simpson, 3 H. & C. 395; 34 L. J. (Ex.) 70, the plea was similar in form.

(1) 18 C. B. (N. S.) 286; 34 L. J. (C. P.) 123.

(2) 5 B & S. 240; 34 L. J. (Q. B.) 25.

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debtor's possession of the property assigned is not unreasonable, for the deed would be valid though there were no *cessio bonorum* at all, as is decided by *Clapham* v. *Atkinson.* (1) If then there need be no conveyance of property at all, the deed cannot be bad because it conveys property under certain restrictions. The provision neither creates any inequality between the creditors, nor puts them in a worse position than they would otherwise be in. On the contrary, the possession of the property, and the power of dealing with it in trade, may be the only means by which the debtor can perform his covenant. The covenant and not the property is looked at in the first instance as the creditors' fund, and it is probable that the composition promised, and which depends on the profits in trade, may be of much greater amount than the value of the debtor's goods. The provision is, therefore, for the benefit of the creditors; but if not, it cannot be denied that the trustee might have been empowered by the deed, at his discretion, to replace the debtor in the possession of his goods, in order that he might acquire by his dealings with them a fund for the payment of his debts: and for the purpose of this dealing, an absolute control would be essential. But if so, why may not the creditors exercise the discretion themselves, and prescribe this remission in possession as a condition for the transfer of the property? Neither is such a provision contrary to the seventh condition of section 192. If that condition is to be construed literally, it has been literally complied with, for the plea states possession to have been delivered. But the more reasonable construction is, to read it as meaning that, wherever property is comprised in the deed, possession shall be *bonâ fide* delivered according to its terms. If the insertion of this condition in section 192 justified the inference contended for, it would justify much more strongly the inference which it was formerly attempted to draw from it, that a deed, in order to be valid under the act, must contain a *cessio bonorum*, and the decision against this latter view supports the present argument. The object of that condition was, not to prescribe to the creditors what form of deed they should adopt, but to protect them against a fraudulent retention of the property contrary to the terms of the deed. But here the state of facts excludes the possibility of fraud, for the mode in which

(1) 4 B. & S. 730; 34 L. J. (Q. B.) 49.

the property is to be dealt with appears on the face of the instrument.

Macnamara in reply. In *Clapham* v. *Atkinson*, (1) the court of Exchequer Chamber, referring to the words of section 192, seemed to think that there might be two kinds of deeds under the act; one relating to the debtor's debt and liabilities, the other to the distribution, management, &c. of his estate. That case decided that a deed of the first class might be valid without any assignment of property; but this deed is one which on the face of it purports to assign the debtor's goods, and is therefore not within that decision. On the other hand it is not an inspectorship deed, which would not operate by means of a *cessio bonorum*, and would not be made with a view of at once acquitting the debtor; for it is a deed which purports to give the debtor a discharge, and which contains a transfer of property. Taken as a deed of this kind, it is unreasonable, because it puts all the property it professes to convey under the debtor's control, and gives neither the trustee nor the creditors any power of preventing the wasting of the existing goods, or of providing for the substitution of others, or of determining the debtor's control over them. It is also contrary to the statutory condition, which means that when property *is* conveyed it shall be done *bonâ fide*, and not in a merely colourable manner.

[BRAMWELL, B. Is it not reasonable to say that the condition is not intended to regulate the form of the deed, but to provide what shall be done, the deed being so and so?]

It does not provide that there shall be a transfer of property, but that, if there be, it shall be a real one. Secondly, as to the omission of the clause reserving rights against sureties, this is so usual and necessary a clause that the creditors are entitled to require its insertion, for in its absence there is nothing to modify the effect of the release in destroying those rights; see per Crompton, J. in *Keyes* v. *Elkins*, (2) per Blackburn, J. in *Hidson* v. *Barclay*. (3) The fact that the debtor's debt is secured to any one of his creditors by sureties is not within the knowledge of his

(1) 4 B. & S. 730; 34 L. J. (Q. B.) 49.
(2) 5 B. & S. 240—253; 34 L. J. (Q. B.) 25—29.
(3) 3 H. & C. 361—369; 34 L. J. (Ex.) 217.

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other creditors, but is within the knowledge of the debtor, and the creditors ought not to be compelled to make the inquiry nor have they the means of doing so. The plaintiff may be defeated by this deed, which may be really invalid by reason of this hidden defect; and then, he having lost his rights, a secured creditor may afterwards avoid the deed, and recover his whole debt against both the debtor and his sureties, which will establish an inequality amongst the creditors. In *Balden* v. *Pell* (1) it was held, that any creditor might take advantage of a condition requiring creditors to whom the debtor had given bills to indemnify him against the claims of holders, without shewing that there were any bills to which the clause could apply.

[CHANNELL, B. In that case a positive act was required to be done, so that upon the face of the deed it appeared that it was invalid, here the plaintiff only complains of an omission.]

The principle is the same; the stipulation there would have prejudiced no one if there had been no creditors to whom it could apply, but it was held that the plaintiff was not bound to prove their existence; the only difference is, that here the fact that the deed is silent makes it a more dangerous snare. Thirdly, it is unreasonable, for in order to support the plea the defendant must say that the release is absolute. If it is conditional on a tender of the composition being made according to the deed (that is at the date of registration), no such tender is averred; the tender averred is no fulfilment of the condition, and therefore the plea is bad: *Hazard* v. *Mare*, (2) *Fessard* v. *Mugnier*. (3) Now this is a release, the most flexible of instruments, and reading the whole together, and with reference to its probable intention, the true construction is to make the release conditional: *Payler* v. *Homersham*. (4) And since in such a case equity would only relieve on terms, it will not assist the plea that it is pleaded equitably. If, however, it is not conditional, the deed, compelling the creditors to take only the debtor's promise as a consideration for an absolute release, is unreasonable on grounds similar to those before stated.

(1) 5 B. & S. 213—219; 33 L. J. (Q. B.) 200.

(2) 6 H. & N. 434; 30 L. J. (Ex.) 97.

(3) 18 C. B. (N. S.) 286; 34 L. J. (C. P.) 125.

(4) 4 M. & S. 423.

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[BRAMWELL, B. In one sense all such deeds, by which creditors are beaten in detail, and compelled to take less than their legal claims, are unreasonable, but not in such a sense as we can act upon. We have not to see that the deed shall be reasonable and fair, but we must give effect to it if we do not see that it is palpably *unreasonable* and *unfair*.]

BRAMWELL, B. We reserve judgment on the point as to the delivery of possession, but I think the parties are entitled to hear our opinion on the other grounds of objection to the deed.

As to the omission of a clause reserving rights against sureties, the answer to the plaintiff's objection is, that it does not appear by any averment in the pleadings that there are any creditors secured by sureties. It is no doubt a reasonable and useful clause to introduce in general, but we cannot say that its absence is fatal, unless it is shewn that there actually are circumstances under which it could have effect if it were present. My brother Channell has distinguished the case cited, *Balden* v. *Pell*, (1) by shewing that the covenant there was that something should be done, whereas here the objection is only that there is an entire silence on the subject.

It is next said that if the release is absolute, and not conditional on payment of the composition, it is unreasonable. In my own private opinion this may be so, but it is for the creditors to say whether they will take 5*s*. instead of 20*s*., and cases are conceivable where it would be really to their advantage, as for instance if by this arrangement they obtained the additional liability of a surety. But whether expedient or not, we cannot say that it is unreasonable in point of law, that is, unreasonable in itself and under all circumstances, and therefore this ground also fails.

With respect to the remaining point, whether the release is or is not conditional, there can be no doubt. It is in terms absolute, and there is nothing to limit the absoluteness of its terms, consequently no question as to the necessity of a tender can arise.

CHANNELL, B. On these three points I am of the same opinion.

(1) 5 B. & S. 213 ; 33 L. J. (Q.B.) 200.

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If the deed is not on its face unreasonable, we cannot assume the existence of sureties and rights against sureties, in order to make it so.

As to the objection that the absolute release contained in it is unreasonable, it is true that the courts have frequently held deeds unreasonable when the creditors were not placed on an equal footing; but here no argument has been, or can be, urged to shew that any inequality is produced by this clause, taken by itself. I agree, indeed, that there may be cases where, though there is no inequality between the creditors, the deed is so unreasonable that no probable state of facts will justify its provisions; but that is not so here, and I protest against the notion that, because we, as judges, may think some provision which the creditors have agreed to inexpedient, we can therefore say, as a matter of law, that it will nullify the deed.

I also think that the release is absolute and not conditional, and, therefore, the point as to the tender does not arise.

PIGOTT, B. I am of the same opinion. As to the non-reservation of rights against sureties, I need add nothing to what has been said. It is also objected that the deed is unreasonable; to judge of that question, we must first determine in what sense we use the term. If by it is meant *inexpedient*, then it is a matter for the contracting parties to determine upon; but if it means *unequal*, or *unjust*, which is the proper sense of the word, so far as we are judges of it, I can discover nothing unreasonable in the release, though absolute. And, thirdly, I am clearly of opinion that the release *is* absolute; it is expressed to be made *in consideration of the covenant and assignment;* and it is impossible, in the face of these words, to make the payment of the composition a condition precedent merely on the ground that it might be more expedient for the creditors. The question as to the tender, therefore, does not arise.

POLLOCK, C.B. I should myself have preferred postponing the expression of my opinion until we could have given judgment on the whole case; but as my learned Brothers thought it due to the parties to state their views now upon that portion of the case on which we are all agreed, I have only to say that I entirely concur with them in opinion on the points upon which

they have delivered judgment, and for the reasons they have stated.

Cur. adv. vult.

Dec. 5. The judgment of the Court (Pollock, C.B., and Bramwell, Channell, and Pigott, BB.) was delivered by

BRAMWELL, B. In this case a deed was pleaded in answer to a money claim, which was said to be binding on the plaintiff, though not an executing party to it, because it was executed by the proper number of creditors, and with the formalities necessary to give it validity under section 192 of the Bankruptcy Act, 1861. We disposed of several objections at the hearing; the remaining objection taken to the deed by the plaintiff was, that although it assigned the defendant's property to a trustee for the creditors, yet by its terms it permitted the debtor to continue in possession of the property until default should be made in payment of the stipulated composition of 5*s.* in the pound. This was said to be in direct violation of the 7th condition of section 192 of the act, which requires that possession of all the property comprised in the deed shall, immediately on its execution, be given to the trustee. This point we reserved for consideration, and we have come to the conclusion that, notwithstanding this objection, the deed is good. It is manifest that it must be so, when it is considered that there is no necessity for any assignment at all of the debtor's property; and if there need be none, it would be absurd to say that this additional advantage given to the creditors may not be modified at the pleasure of the parties, provided it is not so dealt with as to transgress any of the rules laid down by the courts with respect to the validity of such deeds in general. No doubt such conditions might be annexed to it as to transgress those rules; but that is not the case here, and the only objection to the condition is its supposed conflict with the statutory condition above referred to. But the true and sensible construction of that condition is to read it as providing, that when, by the terms of the deed, property is to be given up to the trustee, then, in order to make the deed binding on non-assenting creditors, it must be given up according to those terms. We, therefore, think the deed good, and the demurrer must be overruled.

Judgment for the defendant.

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[IN THE EXCHEQUER CHAMBER.]

WHITTAKER *v.* LOWE.

Bankruptcy — Deed of Arrangement — "Value" of Creditors—Secured and Unsecured Creditors—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134) *s.* 192.

Section 192 of the Bankruptcy Act, 1861, requires that, a deed of arrangement between a debtor and his creditors shall, in order to bind non-assenting creditors, be assented to or approved of in writing by a majority in number, representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to 10*l.* and upwards :—

Held (affirming the judgment of the court below), that, in determining whether the requisite majority in value of the creditors have assented to the deed, the value of securities held by secured creditors is not to be deducted.

Appeal by the plaintiff against a judgment of the Court of Exchequer, discharging a rule to set aside the verdict for the defendant.

The action was tried at the Manchester Spring Assizes, 1865, before Mellor, J. The declaration was on the ordinary money counts, and the defendant pleaded to the further maintenance of the action, a release by a deed of arrangement entered into, since action brought, between himself and the requisite majority in number, representing three-fourths in value of his creditors. It appeared upon the trial that the defendant's creditors were some of them secured and some unsecured. The defendant had himself made a valuation of the securities held by his secured creditors, in accordance with a Bankruptcy order of the 22nd of May, 1862, with a view to the registration of the deed under section 192. The deed was subsequently duly registered. The valuation made by the defendant was disputed by the plaintiff, and the jury eventually found that the securities were worth considerably more than the sum at which the defendant had valued them. If however, their real value as found by the jury was to be deducted from the debts of the secured creditors, it became manifest that the requisite majority in value had not assented to the deed. If, on the other hand, the value of these securities as so found, was not to be deducted, the requisite majority in value

had assented. Under these circumstances a verdict was entered for the defendant, leave being reserved to move to enter a verdict for the plaintiff, on the ground that the value of the securities ought to be deducted in reckoning what was the requisite majority in value of the defendant's creditors, and that the deed pleaded was therefore invalid, not having been executed by the majority in number, representing three-fourths in value of the defendant's creditors, as required by the Bankruptcy Act, 1861 (24, 25 Vict. c. 134) section 192. The first clause of that section enacts, in order that a deed of arrangement between a debtor and his creditors may be valid, that "a majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed."

In Trinity term, 1865, *Holker* obtained a rule *nisi*, pursuant to the leave reserved.

Later in the same term (May 10), *R. G. Williams* shewed cause, and *Holker* was heard in support of the rule.

The Court of Exchequer discharged the rule, considering themselves bound by the decisions in *Ex parte Godden, re Shettle;* (1) and *Turquand* v. *Moss.* (2)

Holker for the appellant, the plaintiff below. The value of the securities held by a creditor should be deducted. In *Re Smith* (3) Westbury, C., expresses an opinion that the "value" of the debt is the amount of the debt *minus* the property held by the creditor. "A creditor's debt, under a trust deed," he says, "must be valued on the same condition as a debt in bankruptcy is proved, *i.e.*, for the balance after deducting the security." In *Ex parte Spyer,* (4) the point is treated in argument as settled. Then as to the authorities followed by the court below. In *Ex parte Godden, re Shettle,* (1) the question seemed rather whether a secured creditor was to be counted *at all;* and in *Turquand* v. *Moss,* (2)

(1) 1 De G. J. & S. 269; 32 L. J. (Bkr.) 37.

(2) 17 C. B. (N. S.) 15; 33 L. J. (C. P.) 355.

(3) 10 L. T. (N. S.) 551.

(4) 1 De G. J. & S. 318; 32 L. J. (Bkr.) 62.

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Byles, J., intimates his dissatisfaction with the authority of *Ex parte Godden* (1) by which he felt bound. The question really depends on the construction to be put on the act of 1861.

[WILLES, J. In the recent act is there anything answering to the proviso at the end of section 224 of 12 & 13 Vict. c. 106; a section which also applied to deeds of arrangement, and which is now repealed? By that proviso the value of the securities was to be deducted.]

There is nothing expressly answering to it; but it is contended that the law is clear that secured debts must not be reckoned, and that therefore the proviso was unnecessary. The intention of the legislature was to give every creditor a control over the debtor's property proportional to his stake in it, and the language of the act is sufficient to carry out that intention. By section 197 it is provided, that "except where the deed shall expressly provide otherwise the court shall determine all questions arising under it according to the law and practice in bankruptcy." Then section 97 enacts that "in the computation of debts for the purposes of any petition under this act, there shall be reckoned as debts sums due to creditors holding mortgages or other available securities, or liens, after deducting the value of the property comprised in such mortgages, securities, or liens," and the practice under this section has been to deduct securities in proving debts. In sections 109, 110, 116 and 124, the word "value" is used with the meaning now contended for.

[MONTAGUE SMITH, J. But the proceedings prescribed by these sections are all after proof, are they not?]

Section 110 contemplates all creditors whether they have proved or not. It gives power to the major part in "value" at the *first* meeting after adjudication to suspend the proceedings in bankruptcy. At the first meeting it would be unlikely that all creditors would have proved.

[MONTAGUE SMITH, J. But until the creditors have proved, there is no constituency.]

These sections at all events, shew what "value" means by the law and practice of bankruptcy. Again in sections 185, 187, relating to the change from bankruptcy to arrangement, the word

(1) 1 De G. J. & S. 260, 32 L. J. (Bkr.) 37.

" value " is used in the same sense as it is used after debts have been proved.

R. G. Williams for the respondent, the defendant below, was not called upon.

WILLES, J. We are of opinion that the judgment of the Court of Exchequer ought to be affirmed. The question turns on what is the true construction of the first member of section 192 of the Bankruptcy Act, 1861. That member of the section expresses one of the conditions under which a deed of arrangement shall be binding, and is in these terms:—" A majority in number, representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall . . . in writing assent to or approve of such deed ;" and the point to be decided now is, whether, in ascertaining who are the persons answering to the description of creditors representing three-fourths in value, securities held by creditors are to be taken into account. Now, three modes of answering this question have been suggested. First, you may apply a like test in considering who are to constitute a majority in *number*, as in considering who are to constitute the three-fourths in value ; and in so doing you are, it is said, to exclude in each case the fully secured creditors. But secondly, because it is said to be impossible to allege that a person holding security is rendered thereby *not a creditor*, it is argued that as it would be impossible so to exclude him in reckoning the majority in number, this section must be taken to mean that he must be reckoned in value, according to the debt presently due to him. That was in effect, the answer of the Lords Justices in *Ex parte Godden, re Shettle*, (1) and in *Turquand* v. *Moss*. (2) In the latter case, my Brother *Byles* considered that but for *Ex parte Godden*, the question might perhaps have admitted of a different answer, but he did not suggest any distinction between the treatment of creditors to ascertain the majority in number, and to ascertain the three-fourths in value. He appears to have thought that, as it might be unjust to count the secured debts, persons fully secured ought to be excluded altogether. The third answer to

(1) 1 De G. J. & S. 260 ; 32 L. J. (Bkr.), 37.
(2) 17 C. B. (N. S.) 15 ; 33 L. J. (C. P.) 355.

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the question at issue is that suggested by Lord Chancellor *Westbury* in *re Smith.* (1) Substantially, it is this: It is true that a person with security is nevertheless a "creditor," and would be so even though his security exceeded his debt. He could not be said not to be a "creditor" until the amount of his security is realized. He must therefore be counted to make up the majority in number; but, inasmuch as his debt may be said to be of little or no value in the peculiar sense of being at no risk, it is not to be taken into account at its full amount. The Lord Chancellor, therefore, suggested a different answer, according as the creditors were being dealt with in regard to a majority in number or in regard to the debts being three-fourths in value.

The question obviously turns upon the construction to be put on the word "value." Both the weight of authority, and of reasoning, I may add, is on the side of reckoning as a "creditor" a person even fully secured, and he must be included in making up the requisite majority in number. Upon that point it is unnecessary to say more. But there is considerable difficulty in construing the 192nd section with regard to the question, whether the securities held by a creditor should be taken into account in reckoning the three-fourths in value. For it may be said that the legislature surely did not intend to leave to the sense of policy or convenience in the courts, the manner in which secured creditors are to be treated—whether their securities are to be reckoned or whether they are not. I can understand a man of good sense and business habits, saying, "My security is not realized; it may never be realized; it may fall or rise; I do not choose to sell now at a price, of which my debtor might afterwards complain;" and in such a case, he might well ask, what is the tribunal which is to settle the matter. He might himself, be of opinion that it would be better to let all the creditors come in and vote in respect of their entire debts. But while that might be the opinion of one man, another might not see the difficulties which were supposed by the former to exist, and might consider it sufficient if the probable value of the secured creditor's debt were ascertained. He might think the legislature would prefer that such difficulties and doubts should exist to

(1) 10 L. T. (N. S.) 551.

giving a secured creditor an inequitable right of disposing of the property of the debtor. There are powerful arguments on both sides, and I should feel great difficulty in deciding between them.

But I have nothing but the Bankruptcy Act before me, and I decline to decide at all upon the question as one of policy. I must look at the language of the act alone. And the real question is, What is the meaning of "value of the creditors?" The expression is a somewhat loose one. "Value of the creditors," must be read as an abbreviation of "value of the debts of the creditors." Now, does this mean the value of the debts in money's worth, when the security is realized, or, perhaps, after a sale in the market, though that would scarcely be a possible construction? *Primâ facie* I should be disposed to say that the "value" of a debt, meant the amount of the debt itself, and that interpretation I find adopted in section 116 of the act of 1861. That is the section relating to the choice of the creditors' assignee, and "value" there clearly means amount; because it is only creditors who have proved, that are dealt with. I am also confirmed in this being the true construction by section 97, which expressly provides that, in the computation of debts for the purposes of any petition under this act, there shall be reckoned as debts, sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages, securities, or liens, adding such interest and costs as shall be due in respect of any of the debts. Here then we have an express provision, 1st, that persons holding mortgages, &c., are "creditors," and 2ndly, "for the purposes of any petition" (a phrase which does not include this case) debts are to be reckoned after deducting the value of the property comprised in such mortgages, &c. Where an uncertainty existed as to the real value, the judge of the court could immediately determine it. Then come the words "such interest and costs as shall be due in respect of any of the debts," which are also to be reckoned as debts. There is therefore an intention expressed in section 97, to provide a special mode of ascertaining debts.

Now, section 97 is affirmatively expressed on this subject with respect to the question of "value" in a different class of cases from

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the present. But not only is the maxim, *expressio unius est exclusio alterius*, therefore, applicable, but another circumstance must be noticed, because it is part of the history of the statute, and is suggested by reference to an act (12 & 13 Vict. c. 106) *in pari materiâ*. I mean that the 12 & 13 Vict. c. 106, in dealing with a cognate matter, did expressly introduce the provision which we are now asked to introduce by construction. The words are the same,—with the exception of the word "such,"—as in s. 97 of the more recent act. They are to be found at the end of s. 224, whereby it was provided that every creditor "shall be accounted a creditor in value in respect of such amount only, as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The enactment uses the word "such," but the difference is not material. Then the proviso uses words expressing a condition, viz., "upon an account fairly stated." It seems, therefore, as if the framer of the section felt the very difficulty to which I have already referred as to who is to settle what is the amount due to the securities held by the creditor, and that he tried to solve it by inserting the words, "upon an account fairly stated." These words are omitted in section 97 of the Act of 1861, but their place is supplied by the jurisdiction of the commissioner.

In section 192, however, the whole proviso which was contained in section 224 of the Act of 1849 is omitted. The latter section is now repealed. I am, therefore, almost inclined to say that the legislature has, as it were, ostentatiously shewn an intention that the proviso so repealed should not apply. Putting, then, the best construction that we can upon the language of the act of 1861, and setting aside all questions of mere policy or convenience, remembering that we do not sit here as legislators, it should seem that the judgment of the court below was right. It must, therefore, be affirmed.

BLACKBURN, J. I am of the same opinion. The question is entirely one of the proper construction of the statute of 1861. Did the legislature intend that it should bear the construction contended for by Mr. Holker? That is the question we have to answer. Now, it is plain that a creditor who holds securities is

nevertheless a "creditor," the only difference between him and an unsecured creditor being that he has securities which he can make available, and if he does so make them, he is not to be suffered to pay himself the debt due to him twice over. But until he has made his securities available, he is a "creditor" to the amount of the debt due to him. By the old law he still remained, although fully secured, a creditor who could petition for an adjudication. So stood the law in 1849. Then the statute passed in that year left his position in bankruptcy untouched. But by section 224 there was, for the first time, introduced a power of making arrangements by deed for a composition. That section enacted that every deed of arrangement between a trader debtor and his creditors executed by six-sevenths in number and value of those creditors, whose debts amounted to 10*l*., was to be binding on all; and upon this there was a proviso that "every creditor shall be accounted a creditor in value in respect of such amount only, as upon an account fairly stated, after allowing the value of mortgage property, or other such available securities or liens from such trader, shall appear to be the balance due to him." The proviso pointedly directs the deductions indicated to be made upon an account "fairly" stated. But whilst the section, which was repealed by the act of 1861, is re-enacted in substance, for some reason or other—perhaps from the difficulty being felt of ascertaining what really was the fair value of the debt in each case—the proviso is not re-enacted. The legislature repeal section 224, and re-enact it in substance by section 192, omitting the proviso. At the same time, they insert a similar provision in section 97, probably because in the cases there contemplated the value of the security might be more easily ascertained. However that may be, we ought not, I think to say that the legislature did mean what they seem to have declared that they do not. The weight of authority also is in favour of the same construction. I, therefore, think that the judgment of the court below should be affirmed.

MELLOR, MONTAGU SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

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ROBERTS AND ANOTHER, *v.* ROSE.

Nuisance—Abatement by entering land of a third party—Balance of injury—Watercourse—Right to obstruct.

The plaintiffs, by parol license from L and from the defendant, constructed a watercourse, and thereby discharged the water from their own mines across the land of L, and thence across the land of the defendant. The defendant, having revoked his license, upon the plaintiffs' refusal to discontinue using the watercourse, entered upon the land of L, at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. The defendant by stopping the watercourse on his own land would have done less damage to the plaintiffs than was actually done, but more damage to L. and possibly some damage to the public:—

Held (affirming the judgment of the court below), that the water-course was obstructed in a reasonable manner, inasmuch as the convenience of the plantiffs, who after revocation of the license were wrong-doers, was subordinate to the convenience of innocent third persons and of the public.

APPEAL by the plaintiffs from the judgment of the Court of Exchequer making absolute a rule to enter a nonsuit, and also from their judgment in the same case discharging a rule to set aside the verdict for the defendant on the third issue.

Declaration.—1st Count: that the plaintiffs being possessed of a colliery were by reason thereof entitled to the privilege of having the water from time to time pumped out of the said colliery, and flow away therefrom along a certain watercourse. Breach: that the defendant wrongfully obstructed the said watercourse, and thereby caused great damage to the plaintiffs, &c.

Second Count: that before the committing of the grievances hereinafter mentioned, the plaintiffs being possessed of a certain colliery, called *Bank Colliery*, did at their own costs and by the license, and with the consent of the owner and occupier of certain land near the said colliery, make a watercourse in the said land for carrying away the water by them from time to time pumped from the said colliery, and from thence until and at the time of the committing of the grievances hereinafter mentioned, during all which period they were possessed of the said colliery, the plaintiffs by the license and with the consent of the said owner

and occupier of the said land enjoyed the advantage of having the water so by them pumped, as aforesaid, flow away from the said colliery along the said watercourse; that the license and consent to enjoy the said advantage, and the plaintiffs' possession of the said colliery continued till the commencement of this suit, and still do continue, and the said license, consent, and advantage were of great value to the plaintiffs; and that the defendant knowing that the plaintiffs were enjoying the advantage aforesaid, wrongfully and wilfully obstructed the watercourse, and thereby prevented the water from flowing along the same away from the said colliery, by means whereof the plaintiffs sustained and will sustain damage in all respects like that in the first count mentioned.

Pleas. First, not guilty. Secondly, to the first count, traverse that the plaintiffs were entitled to the privilege therein mentioned. Thirdly, to the second count, traverse of the license therein mentioned. Fourthly, to the same, that before and at the time when the plaintiffs made the watercourse as in the said count mentioned, and from thence and until, at and after the committing by the defendant of the alleged grievances in the same count mentioned, the defendant was the occupier, and was lawfully possessed of the said land near to the said colliery in which the said plaintiffs made the said watercourse as in the said second count mentioned, and the plaintiffs made the said watercourse in the defendant's said land with the leave and license of the defendant, and with such leave and license used the same until the defendant afterwards revoked such leave and license, and gave notice to the plaintiffs of such revocation, and because the plaintiffs continued to use such watercourse, and to send the water down the same after such revocation and notice thereof, against the will of the defendant, the defendant obstructed the same.

Replication, joining issue as to the first three pleas, and new assignment to the fourth, that the plaintiffs sue not for the obstruction on the defendant's said land of a watercourse on the defendant's land, but for an obstruction, on other land than that mentioned in the fourth plea, and being the land in the second count mentioned, and not being the land of which the defendant was the occupier and possessed as in the fourth plea mentioned,

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of a watercourse made on such other land with the license and consent of William Lowe, the occupier of such other land.

Pleas to new assignment. First, not guilty; secondly, that at the time of the committing by him of the alleged grievances in the new assignment mentioned, the defendant was possessed of certain land adjoining to the land in the new assignment called other land, and the said watercourse in and over such other land was so constructed that the water passing in and along the same was wrongfully discharged from the same on to the said adjoining land of the defendant, and without entering on the said other land in the new assignment mentioned, and obstructing the watercourse on such land, the defendant could not prevent the water from the watercourse from being discharged therefrom, and coming on the land of the defendant in this plea mentioned, wherefore in order to prevent the water from the watercourse from being so discharged and coming on the land of the defendant, the defendant obstructed on such other land the watercourse made on such other land, as he lawfully might for the cause aforesaid.

Replication to pleas to new assignment, first, joining issue thereon; and secondly, as to the second plea, that the obstruction so made by the defendant at the place where it was made was not necessary for preventing the water from being so discharged from the watercourse, and coming on the defendant's land as the defendant knew at the time when he made it; that the obstruction was an obstruction made much higher up the watercourse than the defendant's land, so as to prevent the water from flowing down a large part of the watercourse on the said other land, where the plaintiffs had such license and consent as in the second count mentioned for the flowing thereof; that the water might have flowed along the said last-mentioned part of the watercourse without being discharged from the watercourse, and coming on the defendant's land, or injuring the defendant, and might have been by the defendant lawfully obstructed on the said other land lower down the watercourse after it had flowed over the last mentioned part thereof, and nearer to the defendant's land than the place where he did obstruct it, as the defendant at the time when he made the obstruction well knew, and that if the same had been obstructed lower down the watercourse on the said other land and nearer to the defendant's

land as aforesaid, such obstruction would have prevented the water from being discharged from the watercourse and coming on the defendant's land, and would not have caused the damage to the plaintiffs in the second count mentioned; and such obstruction, which the defendant so made, as aforesaid, was an unnecessary and unreasonable mode of preventing the water from being discharged from the watercourse and coming on the defendant's land, and by reason thereof did the plaintiffs unnecessary damage.

Rejoinder taking issue on the second replication to the second plea to the new assignment, and demurrer thereto. Joinder in demurrer.

The demurrer was argued in Michaelmas Term, 1863, when judgment was given for the plaintiffs, (1) and the issues of fact were tried before Keating, J., at the Staffordshire spring assizes, 1864, when the following facts were proved:—The plaintiffs, being the lessees of a colliery called the Bank Colliery, applied in 1860 to Sir Horace St. Paul, who was the owner (subject to a mortgage) of lands adjoining, for permission to make a watercourse from their pit-shaft across his lands to carry away the water pumped out of their mines. Sir Horace St. Paul, by his agent, gave them a written permission accordingly, and they thereupon made a watercourse from the Bank Colliery to a point whence it emptied itself into an old pit caused by the former workings of a colliery called the Broadwater Colliery. A part of the surface of the last-mentioned colliery was in the possession of William Lowe, as yearly tenant to Sir H. St. Paul. The plaintiffs obtained Lowe's license to the making of the watercourse, and it was also used by him for the purposes of brickmaking. Early in 1861 the plaintiffs were required by Sir H. St. Paul's agent to extend the watercourse over the spoil-banks of the old pit in order to join another watercourse which had been used by former lessees of the Broadwater Colliery, and which ran on into a neighbouring canal.

Soon afterwards, in March, 1861, the defendant obtained from the mortgagees of Sir H. St. Paul a lease of the Broadwater Colliery. The lease was of the coal in or under the land, and leave was given to the defendant to occupy such parts of the lands as might be necessary for the due carrying on of the workings of the coal mines,

(1) 3 H. & C. 162; 33 L.J. (Ex) 1.

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and also to make use of watercourses over the land. There was a reservation to the lessors of a right to make watercourses for the working of certain mines excepted from the lease, proper compensation being made to the lessee.

The defendant, on entering into possession, assented to the continuance of the plaintiffs' watercourse. The extension indicated by Sir H. St. Paul's agent, was subsequently made, as well as another alteration at the defendant's request. The extended watercourse continued to be used by the plaintiffs, subject to a peppercorn rent to Sir H. St. Paul, and also by the defendant until the obstruction mentioned hereafter. Lowe continued to give his license so far as his lands were concerned.

In January, 1863, the defendant applied to the plaintiffs for a money payment in consideration of their use of the watercourse, but after some negotiations the plaintiffs refused to pay anything, contending that as the licensees of Sir H. St. Paul they were entitled to the benefit of the exception in the defendant's lease. The defendant thereupon gave notice to the plaintiffs that the watercourse, having become injurious to their mining operations in consequence of water escaping from it into their works, must be discontinued. A similar notice was given on the 26th of February, and on the 28th of February, the plaintiffs not having paid any attention to the notices, the defendant stopped up the watercourse on Lowe's land near to the boundary between that land and the plaintiffs' colliery. The effect of this obstruction was to pin back on the surface of the Bank Colliery all water pumped out of the plaintiffs' mines into the watercourse, and in May, 1863, the water had accumulated to such an extent that it percolated through the soil into the plaintiffs' mines. Considerable damage having thus been done, and the plaintiffs having been forced to incur expense in obtaining another outlet for the water of their mine, this action was brought. There was considerable conflict of evidence as to the reasonableness of the mode in which the obstruction was made, but it was eventually established that if the obstruction, instead of being made at the boundary between Lowe's land and the *plaintiffs'*, had been made at a lower point where Lowe's land met the land of the *defendant*, the damage to the plaintiffs would have been less, though the damage to Lowe would

have been greater, and there might also have been injury done to an adjoining public road.

The learned judge ruled that there was a question for the jury on the second replication to the second plea to the new assignment, viz., whether the obstruction of the watercourse by the defendant was an unnecessary and unreasonable mode of preventing the water from being discharged from the watercourse on to the defendant's land. For the purpose of the issue he directed the jury to assume that the defendant had a right to go upon Lowe's land in order to stop the water from so coming on the defendant's land in a reasonable way. Upon all the other issues he directed a verdict for the defendant.

With regard to the issue on the third plea to the second count, the learned judge ruled that the defendant was entitled to a verdict, upon the ground that the lease of the Broadwater Colliery to the defendant had revoked the license in the second count mentioned, and that the defendant had therefore a right to stop the watercourse. He also directed the jury to take all the circumstances into account, and upon a review of these circumstances to say whether the mode and place in which the obstruction actually was made were or were not unreasonable or unnecessary.

A verdict was found for the plaintiffs, leave being reserved to the defendant to move to set it aside and enter a nonsuit, on the ground that there was no evidence to support the second replication to the second plea to the new assignment.

Leave was also reserved to the plaintiffs to enter a verdict on the third plea to the second count of the declaration.

Rules were obtained by the plaintiffs and the defendant pursuant to the leave reserved in Easter Term, 1864. They were argued together later in the same term, (1) when the court made absolute the rule obtained by the defendant to enter a nonsuit, and discharged that obtained by the plaintiffs to enter a verdict on the third plea to the second count of the declaration.

The plaintiffs appealed against the judgment of the court below.

Mellish, Q.C. (*H. Matthews* with him), for the appellants, the plaintiffs below. There are two propositions to be contended for,

(1) 3 H. & C. 173; 33 L.J. (Ex.) 241.

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first that the judge ought not to have directed a verdict for the defendant on the third plea to the second count; and secondly, that there was evidence for the jury on the second replication to the second plea to the new assignment. As to the first question, it is submitted that the plaintiffs had a license to have the water flow over the place where the defendant obstructed it, and that the defendant's revocation could not apply to that place, the consent of the occupier having been obtained. It applied to another place more remote from the plaintiffs' land than that where the obstruction was erected. Secondly, there was evidence to prove the second replication above mentioned. The defendant did not obstruct the watercourse in a reasonable way. If he could, as here he might, have put an end to the nuisance complained of by doing an act on his own land, he had no right to go out of his own land to do it.

[BLACKBURN, J. The effect would have been that some damage would have been done to Lowe.]

That might have been so; but still the defendant had no right, without notice to Lowe, whose consent to use the watercourse the plaintiffs had, to stop up the watercourse in the place he did, thereby throwing all the water into the plaintiffs' mines. Lowe would have no ground of complaint except against the plaintiffs, who originally turned the water on to his land. They were the original wrongdoers, and alone answerable, *Scott* v. *Shepherd* (1), The defendant therefore was able to stop the watercourse on his own land without incurring any liability to anybody; had he then any right to go off his own land and stop it much nearer to the plaintiffs' boundary, thus doing them far greater damage?

[LUSH, J. Had the plaintiffs, who were wrong doers, any right to dictate where the water should be stopped?]

The rule is, it must be stopped on the land of the person stopping it, or else on the land of the wrong doer; *Penruddock's Case.* (2) Moreover, in this case the plaintiffs had a right to the flow of water over Lowe's land. They had Lowe's license and, *quâ* the defendant, were in the position of Lowe himself. For this purpose Lowe's land was the plaintiffs' and the defendant had no right to come upon it to abate a nuisance, unless in case of absolute necessity.

(1) 1 Sm. L. C. 4th Ed. 343. (2) 5 Rep. 100. b.

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[MONTAGUE SMITH, J. The question seems really to depend on this: whether Lowe could have brought an action against the defendant if he had stopped the watercourse on his own lands.]

No action could have been brought. A man may do what he pleases on his own land, unless he interferes with an easement or natural right of some other person; *Gale on Easements*, 3rd Ed. 520. *Com. Dig. Nuisance Tit.* (C.); and if there be a nuisance which a person can put an end to by doing an act on his own land, he has no right to go out of his own land to do it.

Gray, Q.C. (*Macnamara* with him), for the respondent, the defendant below, was not called on.

BLACKBURN, J. (1) We are of opinion that the judgment of the Court below should be affirmed. Upon one point, however, which will be presently mentioned, my brother Montague Smith has some doubts. We are all agreed that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself as against the wrong-doer so far as his interference is positively necessary. We are also agreed that, in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if, by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, although an interference with the wrong-doer himself might be justified. Therefore, where the alternative method involves such an interference it must not be adopted; and it may become necessary to abate the nuisance in a manner more onerous to the wrong doer.

Now, applying these principles to this case it appears that a license was originally given to the plaintiffs by Lowe, and by the defendant, to use a watercourse over their lands. It was a revocable license, to which the plaintiffs, Lowe, and the defendant were all parties, whereby the plaintiffs were permitted to pump out water from their mines and send it down over the lands of Lowe and the defendant. Then, as soon as the defendant revoked the license, it became wrong on the part of the plaintiffs to pour down the water

(1) WILLES, J. heard a portion of the argument, but left the Court before judgment was delivered.

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any longer. Lowe had licensed the plaintiffs only so long as the water sent on to his land would flow out of it again. If Lowe had been told of the defendant's revocation, he would have said that the flow of water must be stopped, and the plaintiffs would have had no right to complain of his stopping it, when, at his instance, the very thing must have been done to the plaintiffs that actually has now been done. Could the defendant, then, have lawfully built this dam as now proposed whilst the plaintiffs continued to send water over Lowe's land, thus turning it into a pond? I think not; such a proceeding would have done a wrong to Lowe, an innocent person, and also perhaps to the public road. That being so, it follows that if the defendant had stopped the watercourse in the way the plaintiffs say he ought to have done it, he would have done an injury to Lowe; and therefore it seems, looking at the mischief actually done to the wrong doer, and considering, at the same time, that mischief would have been done to an innocent third party by taking the course suggested, that the way of making the obstruction actually adopted was fair and reasonable.

So far we are all agreed; but then it is to be observed that the defendant, in obstructing the watercourse at the place he chose, did commit a trespass against Lowe by entering on his land and stopping the watercourse where he did. Either way, therefore, there was a wrong as regards Lowe; and my brother Montague Smith thought that perhaps the relative amount of injury was for the jury, and that for this reason there was ground of application for a new trial. The majority of the court, however, think, as to this point, which was not put at the trial, that the slightness of the injury done, coupled with the fact that Lowe made no complaint, brings the case within the principle that a nonsuit shall not be disturbed, on the ground that there is a scintilla of evidence in favour of a contrary verdict.

MELLOR and LUSH, JJ. concurred.

MONTAGUE SMITH, J. I agree in the principles which have just been laid down. My only doubt is, whether the question of fact with reference to Lowe's position is not for the jury. Now, I think that if the defendant could have entered on Lowe's land without committing a trespass, or if he could have stopped up the

watercourse at the lower point without being subject to an action on the case at the suit of Lowe, then he would have been liable in this action, because he would in such a state of things, having two methods open to him, have been bound to choose the point of obstruction least inconvenient to the plaintiffs. But he could not, in fact, have stopped the watercourse at the lower point without flooding Lowe's land. Then again, by doing the work as he did, the defendant subjected himself to an action of trespass at the suit of Lowe. There is therefore a balance of injury, and that is a question of fact for the jury, upon which I do not think them warranted in the conclusion to which they came. That being so, I express a doubt as to whether we are not, in deciding that there was no evidence on this issue, taking upon ourselves too much of the province of the jury. Otherwise I concur with the rest of the court.

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Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

Dec. 1.

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Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—*Deed under section* 192—*Unreasonable provisions—Construction*, "*Creditors.*"

The word "creditor" in the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), means any person who could have proved against the debtor's estate in bankruptcy.

More v. *Underhill*, 4 B & S. 566, overruled.

An inspectorship deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor, inspectors, and all persons then creditors of the debtor, or who would be entitled to prove against his estate in bankruptcy, (cl. 9.) provided for payment of dividends to all such creditors and persons entitled to prove, (cl. 14, 16) allowed creditors to assent for part only of their debt, specifying what part, (cl. 19) allowed the inspectors to set apart dividends for non-assenting creditors and unascertained debts, (cl. 23) gave to the certificate of the inspectors the effect of a discharge in bankruptcy, (cl. 30) provided that if not valid under the act it should bind executing and assenting creditors, (cl. 31) provided that it might be pleaded in bar with the same effect as an order of discharge under the Bankruptcy Act, 1861, and (cl. 32) that anything contained in it contrary to the bankrupt law should be treated as expunged:—

Held (affirming the judgment of the court below), that the deed was valid under 24 & 25 Vict. c. 134, s. 192.

DECLARATION on a bill of exchange drawn by the plaintiff upon and accepted by the defendant, with *indebitatus* counts.

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Plea, an inspectorship deed under s. 192 of the Bankruptcy Act 1861, made between the debtor of the first part, three inspectors of the second part, and "the several persons, companies, and co-partnership firms, who at the date thereof were respectively creditors of the defendant, or who could be entitled to prove under an adjudication of bankruptcy against the defendant, founded on a petition filed on the day of the date of the said deed (thereinafter called the creditors) of the third part;" setting out the 31st clause of the deed, and making the usual averments.

The second replication set out the deed verbatim.

Demurrer and joinder.

The deed was the same as that discussed in *Strick* v. *De Mattos* (1), and the case was in substance an appeal from that decision, and judgment had been taken without argument in the Court of Exchequer, in order to bring the question before this court.

The substance of the clauses in the deed which were discussed was as follows (2):—

By clause (1), the debtor's estate was to be administered in accordance with the principles of the present bankrupt law in England, or as near thereto as circumstances would permit, having regard to the terms of the deed.

By clause (9), the estate was to be applied (after payment of costs and expenses, and sums paid for the purpose of realizing and winding-up the estate), in paying rateably, and without prejudice or priority, the several debts, claims, or demands of the creditors, until full payment or satisfaction thereof, and of all interest which would be payable thereon under an adjudication in bankruptcy.

By clause (13), each creditor, before becoming entitled to receive any dividend, should, if required by the inspectors, deliver to them a statement in writing of his claim, with all the particulars usual on a proof in bankruptcy, and verify the same by a solemn declaration, both of the amount of the claim and of its consideration, such verified statement not to be conclusive evidence.

(1) 3 H. & C. 22; 33 L. J. (Ex.) 276.

(2) In one of the reports cited of *Strick* v. *De Mattos* (3 H. & C. 22), the whole deed will be found set out, in the other (33 L. J. (Ex.) 276) the clauses 7, 9, 13, 19, 30, 31 & 32.

By clause (14), in all cases where any person had received from the debtor negotiable instruments—made, drawn, accepted, or indorsed by him, or on his behalf—which had been negotiated, and were in the hands of third parties, either of such respective parties, namely, the original holders or recipients of such negotiable instruments, and the present or ultimate holders thereof, as well as any intermediate indorsers, might be admitted to execute, or assent to, or approve of the deed, without such act being an admission that they respectively were, or would become, creditors; but, whichever of such respective parties to each such negotiable instrument should ultimately become the real holder thereof for value, should be deemed to be the creditor, and as such the party to the deed in respect of such negotiable instrument; and in that case the execution, assent or approval by the other or others of such parties, in respect of such negotiable instrument, should be considered only as evidence of his, her, or their consent to such holder having or deriving the benefit of these presents in respect thereof, but without prejudice to his, her, or their execution, assent, or approval in respect of any other debt or claim; and until it should be ascertained who would ultimately be the creditor in respect of such negotiable instrument, all the persons who should have executed, assented, or approved in respect of such instrument, should be deemed to be one creditor only. And, generally, any person who might claim to be, or expect to become, a creditor or claimant, whether presently or by the ultimate non-payment or deficiency of any negotiable or other security which he might hold, or upon the adjustment of any difference or unsettled account, or by any other event, might execute, assent, or approve, without such execution, assent, or approval, being an admission of his being a creditor or claimant, save in so far as he might be ultimately found to be such creditor or claimant.

By clause (16), in case any creditor should be desirous of executing, assenting, or approving, in the first instance as to part only of his debt or claim, from fear of prejudicing his claim or demand, in respect of the remainder of such or of some other debt or claim, against some other person or persons, notwithstanding the provision in that behalf next thereinafter contained,

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such creditor might come in and execute, assent, or approve, in respect of any portion of his debt or demand (such qualification, and the amount of his debt or demand to which he might desire to limit his execution, assent, or approval, to be specified opposite to or under his name subscribed to the deed, or to such assent or approval), and such qualified execution, assent, or approval, should not extend to any other debt or claim so as to prejudice his rights or remedies in respect thereof; but, save so far as any limitation might be so expressed, all the creditors executing, assenting, or approving, should be bound in respect of all, and the entire debts, claims, and demands which they might respectively have against the debtor. And in case any of the creditors should so execute, assent, or approve, in respect of part of a debt, or alleged debt, this clause should not prevent the deed being obligatory upon him in respect of the residue of his debt as a non-executing or non-assenting creditor, by reason of the provisions of the Bankruptcy Act, 1861.

By clause (17), creditors' rights against sureties were reserved.

By clause (19), in case any dividend should be made before all the creditors named in the statement to be prepared by the debtor should have executed, assented, or approved, the inspectors might cause to be set apart a sufficient sum for the purpose of paying like rateable dividends to such last-mentioned creditors, and also for the purpose of paying like dividends to any of the creditors who should have executed, assented, or approved, but the dividends on whose debt should not have been ascertained; or, in case no such sum should be set apart, they should be at liberty to direct that out of the first moneys which should afterwards be applicable to a dividend, the dividend or dividends payable to the last-mentioned creditors should be paid to, or set apart for, them respectively, before any further dividend should be made among the creditors who might have previously executed, assented, or approved, but not so as to disturb any dividends previously paid.

By clause (21), if at any time before the whole of the debtor's estate should be fully administered, dividends of 20s. in the pound should not have been paid, or realized and provided for the creditors, the debtor should, if so required by the inspectors, convey and assign all his estate and effects to such person as the inspectors or

creditors might direct, in trust, to be administered according to the laws of bankruptcy among the creditors; and as to any surplus, in trust for the debtor.

By clause (23), if, and when the estate should have been fully administered, according to the deed, to the satisfaction of the inspectors, they might certify the fact in writing under their hands, indorsed on or referring to the deed, and thereupon such certificate should be conclusive evidence of the truth of the matters to be therein alleged; or in case of such conveyance or assignment of all the debtor's estate and effects having been made by him as aforesaid, and the same being certified, such certificate (except only for the purpose in the present clause provided for, and without prejudice to the rights of the creditors to or over the property so conveyed or assigned, or to or over any dividends, or funds for dividends, then provided but not actually paid to the creditors) should operate and be a release and discharge to the debtor, as fully and effectually, and in like manner, as an order of discharge under an adjudication in bankruptcy, and might be pleaded accordingly to all actions, suits, and proceedings, in respect of any of the debts, claims, and demands of all or any of the creditors. Provided, that if at any time after such conveyance and assignment the debtor should become bankrupt, and the arrangement made by the deed, or the property comprised in any such conveyance and assignment, should thereby be in any way prejudiced or affected, then such release and discharge as aforesaid should not prevent the creditors respectively from coming in under such bankruptcy, for any purposes for which they would, but for such release and discharge, have been entitled to come in.

By clause (30), it was provided that the deed was intended to be, and should be (so far as it by law might be), a deed of inspectorship within the provisions of the Bankruptcy Act, 1861; but if, for any reason, it could not so operate, it should be binding on all creditors executing, assenting, or approving. And it should be lawful for the inspectors to take and defend all such actions, suits, and other proceedings, as they might think fit, for the purpose of giving effect to it and establishing its validity, and in defence of the debtor at the suit of any of the creditors taking proceedings against him, or refusing to be bound by the deed, and they should

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be indemnified out of the estate in like manner, and to the same extent, as if they had been assignees under an adjudication of bankruptcy against the debtor, founded on a petition filed on the day of the date of the deed.

By clause (31), after reciting that it was intended that the deed should be taken by the creditors in lieu of their several and respective debts, claims, and demands, in respect whereof dividends would become payable under the deed, or proof could be made under an adjudication of bankruptcy against the debtor, founded on a petition filed on the day of the date of the deed, it was declared that if any of the creditors should, whilst the deed was in force, commence or prosecute any action, suit, or other proceeding, in respect of any such debt, claim, or demand as aforesaid, the deed and the provisions therein should operate, and have the same force and effect, as an order of discharge which had taken effect under the Bankruptcy Act, 1861. And that this declaration might be pleaded and used in bar of or as a defence or answer to every such action, suit, or other proceeding, in like manner and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used, in case the debtor had been adjudicated bankrupt in respect of any of the debts, claims, or demands of the creditors, or any of them, and had obtained his order of discharge under such adjudication.

By clause (32), after reciting that it was intended that the estate and effects of the debtor should be administered upon the principles of the bankrupt law, or as near thereto as circumstances would admit of, and that the rights of creditors should be regulated by the same principles, it was declared that the deed should be construed so as give effect to such intention; and that, in the event of anything therein contained being deemed to be inconsistent with those principles, the deed should be read and construed as if such inconsistent matter were expunged therefrom, and had never been part thereof, and in lieu thereof the law of bankruptcy, or the rule of administration adopted thereunder, should be substituted.

June 21, 22. *Joseph Brown, Q.C.* (*Day* with him), for the plaintiff. First, clause 31, containing the absolute release on which the plea is founded, ought by the operation of clause 32 to be

struck out of the deed, for it is inconsistent with the practice in bankruptcy, where the debtor is only released from his legal liabilities by the final discharge, and up to that time is only protected from process. But, further, it has never been decided by this court that in a deed of this kind such a release is allowable, nor is it reasonable that it should be. For, first, it cannot be provided that a private transaction shall have the same effect as a discharge in bankruptcy, and, secondly, if good it puts the dissenting creditor, who is defeated by it, in the position of losing his right. For he could not afterwards verify his debt under clause 13, and there is no authority for saying that a creditor can maintain an action for a debt after a plea of discharge such as this, and judgment against him thereon, nor that he could prove in bankruptcy. This becomes more obvious if clause 31 is compared with clause 23, where the release which is annexed as a consequence to the certificate there provided for, is qualified so as to save the right to dividends. *Dell* v. *King* (1), *Hidson* v. *Barclay* (2), Bankruptcy Act, 1861, s. 161. If clause 31 is rejected as inconsistent with the bankrupt law, the deed cannot be pleaded in bar. *Ipstones Park Iron Ore Company Limited* v. *Pattinson.* (3)

Secondly, clause 23 is unreasonable in making the certificate of the inspectors conclusive, although in fact the estate may not have been administered, and although some creditors may never have received dividends, especially since foreign creditors will be equally bound. The certificate is made *ex parte*, and without examination of the debtor, and is final. Compare with this the provisions of the Bankruptcy Act, 1861, ss. 140, 141, 159, 168, 171. *Woods* v. *Foote* (4), *Leigh* v. *Pendlebury* (5), *Coles* v. *Turner.* (6)

Thirdly, the effect of clause 30 is to divide the estate among the assenting creditors alone, in case the deed is invalid under the act; and this distribution of the whole estate among a part of the creditors being an act of bankruptcy, it contravenes the policy of the bankruptcy law.

(1) 2 H. & C. 84, 33 L. J. (Ex.) 47.

(2) 3 H. & C. 361, 34 L. J. (Ex.) 217.

(3) 2 H. & C. 828, 33 L. J. (Ex.) 193.

(4) 1 H. & C. 841 32 L. J. (Ex.) 199.

(5) 15 C. B (N. S.) 815; 33 L. J. (C. P.) 172.

(6) 18 C. B. (N. S.) 736; 34 L. J. (C. P.) 198.

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Fourthly, clauses 14 and 16 allowing a creditor to assent for a part of his debt are bad, since other creditors may be misled by such an assent. Forsyth on Composition Deeds, pp. 51, 52, citing *Holmer* v. *Viner* (1), *Britten* v. *Hughes*. (2)

[CROMPTON, J. It does not appear that this has been done in any instance here.]

[BLACKBURN, J. There can be no fraud nor even mistake here, for the scheme of the deed is patent on its face, and a creditor assenting for part only of his debt must express that he does so and must state the amount for which he assents.]

But this would not inform the other creditors of the amount of the remainder of the debt.

Fifthly, the deed makes all who could prove in bankruptcy creditors, but the word "creditors" in the act must mean only those who are strictly creditors, for this is its natural sense, and no extended meaning is given to the word in the interpretation clause, s. 229.

[CROMPTON, J. In section 192 the words are "debts or liabilities;" the latter term is larger than debts.

[BLACKBURN, J. In sections 144, 145, also, the words "creditor" and "debt" appear to be used in the wider sense, for those sections must apply to all provable claims.]

In 12 & 13 Vict. c. 106, s. 172, &c., and 24 & 25 Vict. c. 134, s. 150, &c., special provision is made for the proof of such claims in bankruptcy, but there is no such provision with respect to deeds under section 192. The protection provided by section 198 only applies to debts. *More* v. *Underhill* (3) is a distinct authority in the plaintiff's favour, for there the defendant would clearly have been protected by a discharge in bankruptcy.

[*Per Curiam.* That case was only an application for a rule *nisi*, and is therefore of less weight.]

Sixthly, clause 19 imports that dividends will not be paid to creditors until they assent, and, taken in connection with clause 30, it enables the inspectors to put a pressure upon dissentient creditors by the threat of holding back the dividends, and by the fear of the estate being wasted in litigation. *Hernuliwicz* v. *Jay*. (4)

(1) 1 Esp. 134.
(2) 5 Bing. 460.
(3) 4 B. & S. 566.
(4) 34 L. J. (Q. B.) 201.

Beresford (*Mellish, Q.C.*, with him), for the defendant, was desired to confine his argument to the two last points.—The 19th clause does not bear the construction put upon it, but is entirely for the benefit of non-assenting creditors. Before the assenting creditor gets his dividend, a sum is to be set apart for the others, but the assenting creditor does not entitle himself by assenting, nor does the dissenting creditor lose his right by holding back. In each case the creditor only gets his dividend by proving his debt, and on such proof he does get it. There are no words of exclusion.

[CROMPTON, J. That seems to be so.]

As to the other point, the word "creditors" in section 197 must mean all who could have proved in bankruptcy, for all rights under a deed are by that section assimilated to rights in bankruptcy; but in section 192 the word must have the same meaning, and must therefore include all who could prove. If the other construction is adopted, the act fails to carry out the intention of the legislature; for that intention obviously was, to prevent the estate from being wasted and the creditors delayed by proceedings in bankruptcy, and the legislature must therefore have intended to settle all rights and liabilities which would have been settled by the tribunal for whose action the deed is substituted. In *Ex parte Mendel, re Moor* (1), it was assumed that the claim on a contract broken before the making of the deed could have been proved under the deed, and that case is therefore an authority for the extended construction.

Brown, Q.C., in reply. Creditors in respect of an unliquidated debt could not make an affidavit of debt, nor file a petition of bankruptcy; their exclusion therefore will not give an opening for bankruptcy proceedings. They cannot be taken into account in estimating the value of the debts at the date of the deed, for the amount of their claims is then unknown. In many cases the creditors for damages exceed in amount the creditors for debts properly so called, as in the case of underwriters. It is therefore unreasonable that they should be bound by the decision of the other creditors.

Cur. adv. vult.

(1) 33 L. J. (Bkr.) 14.

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Dec. 1. The judgment of the court (Crompton, Willes, Byles, and Blackburn, JJ.) was delivered by—

BLACKBURN, J. This was a case in error from the Court of Exchequer, which was argued in the sittings after Trinity Term before Mr. Justice Crompton, my brothers Willes and Byles, and myself. My brother Keating, who heard the beginning of the argument of the case, was obliged to go to Chambers before the only point on which we took time to consider arose.

The question was whether a composition deed was binding on the plaintiff, who had not assented to it. The same deed had been previously held good by the Court of Exchequer in the case of *Strick* v. *De Mattos* (1), and the present case was in substance an appeal from that decision.

A great many objections were raised before us, all of which were disposed of in the course of the argument, except the following one. The deed is expressed to be between the debtor, his inspectors, and the persons "who at the date hereof are respectively creditors of the said De Mattos, or who would be entitled to prove under an adjudication of bankruptcy against the said De Mattos on a petition filed on the day of the date of these presents, hereinafter called *the creditors*;" and the different provisions of the deed are in favour of the creditors thus defined.

It was objected that many claims can be proved in bankruptcy which are not strictly debts, but contingent liabilities, with a special machinery provided for their proof, and it was contended that the persons who were entitled to prove such claims were not creditors within the meaning of the 192nd section of the 24 & 25 Vict. c. 134.

My brother Willes entertained some doubts whether this objection was not well founded, and in deference to him we took time to consider. His doubts, I believe, are not yet altogether dispelled, though he does not dissent from our judgment. The other members of the court, including the late Mr. Justice Crompton, whose opinion on the point was very decided, were of opinion, and on consideration my brother Byles and myself still are of opinion, that throughout the bankrupt acts the word "creditor" is used in the sense of a person having a claim which can be proved under

(1) 3 H. & C. 22; 33 L. J. (Ex.) 276.

the bankruptcy, whether it is strictly a debt or not; and we think that in the 192nd section it must be understood to mean all persons who had at the time of the execution of the deed a claim against the debtor, proveable against his estate if he then became bankrupt.

We therefore think that this objection also fails, and consequently that the judgment must be affirmed.

Judgment affirmed.

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXIX VICTORIA.

1866
Jan. 11.

JOURDAIN *v.* PALMER.

Practice—Interrogatories—Common Law Procedure Act, 1854 (17 & 18 *Vict.* *c.* 125) *s.* 51.

3 QB 778

In an action for a breach of contract, whereby the plaintiff's patent became void, laying as damages loss of profits, the defendant paid money into court, and applied for leave to deliver interrogatories directed to ascertain the probable value of the patent. The application was refused.

Wright v. *Goodlake* (1) commented on.

THIS was an application by the defendant for leave to deliver interrogatories to the plaintiff, under 17 & 18 Vict. c. 125, s. 51.

The declaration, after stating that the plaintiff was possessed of an invention, set out an agreement of 10th April, 1862, made between the plaintiff and the defendant, by which it was agreed that Jourdain should, at the cost of Palmer, obtain provisional protection and letters patent for the invention; that the letters patent when obtained should be assigned to Palmer; that Palmer should use his best endeavours to promote the adoption of the invention, and make it productive by using it in his own manufactory, and by

(1) 34 L. J. (Ex.) 82.

granting licences; that Palmer should receive all moneys to become due in respect of the patent, which should be employed, first, in repayment to him of all his expenses, the surplus to be divided equally between Jourdain and Palmer; that if within two months from the date of the provisional protection Palmer should give a written notice to Jourdain of his intention not to proceed, his rights under the agreement should cease; but if he did not give notice he should be bound to pay the costs of the letters patent and specification; but if at any time Palmer should not think it desirable to continue working the invention, or to pay stamp duties becoming due in respect of the letters patent, or to take or defend proceedings at law or in equity for the protection of the patent, and should give six months' notice in writing to Jourdain, he should not be obliged to continue working the invention, or to make any payment or incur expense on account of the patent, but should be bound at his own expense to re-assign the same to Jourdain his executors or administrators on demand. The declaration then alleged that on 10th April, 1862, provisional protection was obtained, and that Palmer did not within two months of that time give notice to Jourdain of his intention not to proceed with the patent, and after the expiration of the two months, and after the obtaining of letters patent, and before the commencement of the suit, it became necessary for the purpose of proceeding with the letters patent on the terms of the agreement, and preventing the avoidance of them under 16 & 17 Vict. c. 5, s. 2, to pay 50*l.* for stamp duty in respect of the letters patent before the expiration of 10th June, 1865, of which the defendant then had notice. Averment of performance of conditions precedent, and that no notice of the defendant's determination not to pay the stamp duty was given to the plaintiff by the defendant in accordance with the agreement. Breach: that the defendant did not pay the stamp duty, whereby the letters patent became void. Averment of damage by loss of profits.

The interrogatories which the defendant asked leave to deliver were, in substance, as follows: Whether the plaintiff had ever made, or caused to be made, any and what quantity of material under the patent? What quantity of such material was then in his possession or power? What quantity (if any) he had disposed

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of, and to whom, and for what consideration, and how much of such consideration had been received by him? Whether he had received any and what samples of material manufactured by the defendant under the patent, and what had become of the same? Whether he constantly exerted himself to the utmost of his ability, from the 10th April, 1862, to the commencement of this action, to obtain orders for material manufactured by the said process; and whether he had been able to obtain any order, and from whom, and for what amount?

Application had before plea been made at chambers before Martin, B., for leave to deliver these interrogatories, and leave had been refused; the defendant having paid 50*l.* into court, and having then again applied at chambers before Channell, B., and been refused, now renewed his application before the court.

Murphy, in support of the application, cited *Wright* v. *Goodlake* (1), and contended that the defendant was, according to that decision, entitled to have these questions answered, in order to guide him in paying money into court. The questions go to the substance of the plaintiff's claim, which depends upon the value of the patent, and this the defendant says was worthless, and was, for that reason, abandoned by him.

[MARTIN, B. No, for a breach of contract the plaintiff is always entitled to nominal damages, and this touches only the question of amount. *Wright* v. *Goodlake* (1) was in tort, and is distinguishable on that ground; but if it authorizes such an application as this, the sooner it is overruled the better.]

[CHANNELL, B. You should have applied for particulars of damage.]

Such discovery could be obtained in equity, and if so, it ought to be granted here.

[POLLOCK, C.B. If the plaintiff were seeking to recover an equitable demand against the defendant, arising out of this agreement, and the defendant were to claim an equitable set-off, and for that purpose sought to have an account, in the nature of a partnership account, for moneys included in the agreement, he would probably be entitled to it; but that is widely different from this case.]

(1) 34 L. J. (Ex.) 82.

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POLLOCK, C.B. I think my brother Channell was quite right in refusing this application, and I agree with my brother Martin in doubting whether *Wright* v. *Goodlake* (1) would be followed up on every occasion to which it might be apparently applicable. It is sufficient at present to say of that case that it was an action of tort for infringement of a copyright, whereas the present case is one of contract. Because a court of equity would, under some circumstances and for some purposes, allow such questions as these to be put, it is urged that we ought to allow them in the present action. But it is correctly laid down as an established rule with respect to equitable pleas, that no such plea is good unless it goes to the root of the action, so as to settle all questions raised in it. On the same principle interrogatories ought not to be allowed unless they relate to the substance of the action. Now, in equity such questions as these would be allowed only for the purpose of obtaining accounts, with a view to settle the mutual rights of the parties under the partnership or quasi-partnership, which would have been constituted between the plaintiff and defendant if the patent had been proceeded with, and moneys received under this agreement. But that is not an account which could be taken in this court, nor is the action brought with any such view, but is founded on the breach of the agreement by the defendant. Neither *Wright* v. *Goodlake* (1), nor the analogy of discovery in equity, will justify this application.

MARTIN, B. The usual rule is, that a party is entitled to discovery as to all matters which relate entirely to his own case, but not as to matters which relate to the case of the other party. The action here is for breach of contract, and the defendant, paying money into court, asks leave to deliver interrogatories which relate only to the plaintiff's case, and which really investigate whether the plaintiff will be able to prove certain facts. It is unfair to call upon him to state his case beforehand, and I think my brother Channell's order quite right.

PIGOTT, B. I think this is a fishing application, made for the purpose of discrediting the plaintiff's case, and I doubt whether the case cited assists the application.

CHANNELL, B. On consideration I adhere to my opinion. The

(1) 34 L. J. (Ex.) 82.

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defendant wishes to interrogate the plaintiff as to the damage sustained by him in consequence of the defendant's breach of contract in not paying a sum of money to a third party. It is quite certain that although the statute has given this court the power of administering interrogatories, yet we should not allow them in a case where the party asking leave would not obtain relief in a court of equity, whose rules are in general taken by us as a guide in determining where they should be allowed. Now I am far from saying that such discovery would not be given in equity in respect of moneys received by the plaintiff in which the defendant had an interest under this agreement; but that is not this case. We must take it as if the plaintiff had replied damages *ultrà*, and I cannot see that under these circumstances the discovery asked for would be obtained in equity, or that it is in any way relevant to the substance of the action.

Application refused.

Jan. 16.

ROE *v.* BRADSHAW.

*Bill of sale—Affidavit—Description of grantor's occupation and residence—"Best of the belief" of deponent—*17 *and* 18 *Vict. c.* 36 (*Bills of Sale Act*, 1854) *s.* 1.

An affidavit annexed to a bill of sale described the grantor's residence and occupation to the "best of the belief" of the deponent:—

Held, a sufficient description to satisfy the requirements of 17 & 18 Vict. c. 36, s. 1.

ACTION against the sheriff of the county of Surrey for a false return of *nulla bona* to a writ of *fi. fa.* The defendant paid 15*l.* into court, and the only issue was whether that sum was sufficient to satisfy the plaintiff's claim. The cause was tried before Bramwell, B., at the sittings in London after Michaelmas Term, 1865, when it appeared that before the writ could be executed, the execution debtor had, by a duly registered bill of sale, transferred all his goods within the defendant's bailiwick, except goods to the value of the sum paid into court, to a third person. The affidavit of the attesting witness to the bill contained a statement of the time of the bill being given, and also a description, "*to the best of the belief*" of the deponent, of the residence and occupation

of the grantor. The description was, in fact, a true one. It was objected on the part of the plaintiff that the affidavit of description was insufficient, and that the bill was therefore void against an execution creditor according to the provisions of 17 & 18 Vict. c. 36, s. 1. Assuming it to be void, the plaintiff was shewn to be entitled to 7*l.* in addition to the 15*l.* paid into court. A verdict was entered for the defendant, leave being reserved to move to enter it for the plaintiff for 7*l.* beyond the sum paid into court, on the ground the bill of sale was void as against him.

Section 1 of 17 & 18 Vict. c. 36 enacts that every bill of sale of personal chattels, or a true copy thereof, and of every attestation of the execution thereof, shall, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale," be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale; otherwise such bill of sale shall . . . as against all sheriffs' officers and other persons seizing any property comprised in such bill of sale in the execution of any process of any court of law or equity, and against every person on whose behalf such process shall have been issued, be null and void.

M. Chambers, Q.C. (*Henry James* with him), moved for a rule pursuant to the leave reserved. The affidavit only describes the residence and occupation of the grantor of the bill "to the best of the belief" of the deponent; and that is not a sufficient compliance with the provisions of 17 & 18 Vict. c. 36, s. 1. *Pickard* v. *Bretz* (1), *Tuton* v. *Sanoner.* (2) Perjury could not be assigned on so general a statement. The "best" of a man's belief may mean little better than no belief at all. To allow an affidavit in this form would lead to the making of illusory affidavits.

POLLOCK, C.B. The Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, requires that every bill of sale, and every attestation of the exe-

(1) 5 H. & N. 9; 29 L. J. (Ex.) 18.
(2) 3 H. & N. 280; 27 L. J. (Ex.) 293.

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cution thereof, shall be accompanied by "an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same;" and the question is whether an affidavit made stating the time of such bill of sale, followed by a description of the residence and occupation of the person making the same "to the best of the belief" of the maker of the affidavit—the maker stating it to be so and so—is sufficient. I am of opinion that such an affidavit is a sufficient compliance with the statute. It *does* contain a description of the residence and occupation of the grantor of the bill of sale. But then it is objected that this is only an affidavit of the *best of the belief* of the maker. I think, however, that a man who makes such a statement imports that he is entitled to entertain the belief he expresses, and that we must not take him to mean that the "best" of his belief is no belief at all. When a case arises where such turns out to be the meaning of the man making the affidavit, the Court will be able to vindicate its dignity. The danger suggested by Mr. Chambers is that a man may shelter himself behind a quibble, but I think that would turn out to be a mistake. I am therefore of opinion that the statement in this affidavit, which is really the truth, is sufficient.

MARTIN, B. I am of the same opinion. The question is whether the Bills of Sale Act has been complied with, for we ought not to require more than the act requires. This affidavit *does*, I think, contain a description of the residence and occupation of the maker of the bill, and it is a true description. It seems to me that if we adopted the view urged on us we should have to go the length of holding that no person can attest a bill of sale who cannot give *legal* evidence of the contents of his affidavit, *i.e.* not hearsay evidence; and I am not prepared myself to go that length.

CHANNELL, B. I also think this affidavit sufficient. What is required is, first, that every bill of sale, and every attestation of the execution thereof, shall be accompanied by an affidavit of the time of such bill of sale being made. Now, that point has clearly been complied with. Then, secondly, there is to be "a description of the residence and occupation of the person giving the same;" and I think that this affidavit contains a description of the residence and occupation sufficient under the statute.

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BRAMWELL, B. I reserved this point at the trial because the affidavit was the first in this form which had come under my notice. I think that the Lord Chief Baron has indicated the right way of meeting the case. An affidavit cannot be construed to mean more than the belief of the man who makes it. But a man's belief and the best of a man's belief are really the same things. My doubt was whether there might not be opportunity given for making a quibble. It is said that the "best" of a man's belief may be worth nothing. To this the Lord Chief Baron gives the true answer. A man who swears to the "best" of his belief swears that he has a belief. Our decision may perhaps produce some laxity in affidavits, and it was because I felt that, that I thought it right to reserve the point. I am glad to find that the court entertains the same opinion as I entertained at the trial, viz. that the objection is an invalid one.

Rule refused.

RAMSGATE VICTORIA HOTEL COMPANY LIMITED *v.* MONTEFIORE. *Jan.* 17.

SAME *v.* GOLDSMID.

Company—Allotment of Shares—Reasonable Time.

The defendant in one of the above actions for non-acceptance of shares, applied for shares on June 8, but no allotment was made till Nov. 23. On Nov. 8, he withdrew his application.

The facts in the other action were the same, except that the defendant had never withdrawn his application:—

Held, that the allotment must be made within a reasonable time, that it was not so made, and, therefore, that neither defendant was bound to accept the shares allotted.

THESE were actions for non-acceptance of shares, and for calls, and cross-actions for recovery of deposit, and for damages for not duly allotting shares, turned into a special case.

The company was completely registered 6th June, 1864. By the 2nd article of association it was provided that the company should continue incorporated, notwithstanding that the whole number of shares in the company might not be subscribed for or issued, and might commence and carry on business when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing.

The prospectus of the company contained the following words:—

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"Deposit on application 1*l.* per share, and 4*l.* on allotment." And it was further stated that if no allotment were made the deposit would be returned.

The defendant Montefiore, on the 8th June, 1864, filled up, signed, and sent to the directors the printed form of application annexed to the prospectus, which was as follows:—

"GENTLEMEN,—Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me 50 shares of 20*l.* each in the Ramsgate Victoria Hotel Company (Limited); and I hereby agree to accept such shares, or any smaller number that may be allotted to me, to pay the deposit and calls thereon, and to sign the articles of association of the company at such times and in such manner as you may appoint."

The defendant had so paid the sum of 50*l.*, and had taken from the bankers the following receipt:—

"Received, the 8th June, 1864, on account of the directors of the Ramsgate Victoria Hotel Company (Limited), the sum of 50*l.*, being the deposit paid in accordance with the terms of the prospectus, on an application for an allotment of 50 shares in the same undertaking."

On 17th August the secretary made out and submitted to the directors a list of applicants for shares up to that time, in which appeared the name of the defendant for 50 shares. The list was headed "List of subscribers, August 17, 1864."

On the 2nd November the secretary again submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On the 8th November the defendant, having received no communication from the company, withdrew his application.

On the 23rd November the secretary prepared another list of subscribers, including the defendant's name. The directors made the first call, and by their direction the secretary wrote the following letter to the defendant:—

"SIR,—I am instructed by the directors to acquaint you that, in compliance with your application, they have allotted to you 50 shares in this company, and have entered your name in the register of shareholders for the same; and I have to request that you will pay the balance of the first call, as noted below, on or

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before the 15th December, to the London and County Bank, 21, Lombard Street, E.C."

The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

It was contended by the company that the last-mentioned list and those previously mentioned, or one of them, constituted a sufficient register of shares within the Companies' Act, 1862.

The directors had entered into an agreement for the purchase of the site of the hotel, paid the deposit, and commenced operations.

The facts with respect to Goldsmid were the same, except that he had never withdrawn his application, nor given any notice of his intention to do so.

Mellish, Q.C. (*Digby* with him), for the company, contended that, although, in ordinary cases, the assent of both parties, mutually communicated, was necessary to form a contract, yet on the authority of *Ex parte Bloxam* (1), and *Ex parte Cookney* (2), shares might be completely allotted without any communication to the applicant, or acceptance by him; that the facts above stated shewed an allotment made on the 17th of August; but that, if not, the allotment in November was, considering the nature of the contract, made within a reasonable time, and, if so made, the letter of withdrawal was inoperative.

M. Chambers, Q.C. (*Cohen* with him), for the defendants, were not called on.

THE COURT (POLLOCK, C. B., MARTIN, CHANNELL, PIGOTT, BB.), observed that in both the cases cited, the question was as to the liability of an applicant for shares as a contributory, and they referred to the judgment of Turner, L.J., in *Ex parte Bloxam* (3), as explaining the *ratio decidendi* in that case; they held that there was no allotment till November 23rd, that the allotment must be made within reasonable time, and that the interval from June to November was not reasonable, and therefore gave

Judgment for both the defendants.

(1) 33 L. J. (Ch.) 519, 574. (2) 3 De G. & J. 170; 28 L. J. (Ch.) 12.
(3) 33 L. J. (Ch.) 575–6.

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Jan. 18.

Bankruptcy Act, 1861, (24 & 25 *Vict. c.* 134)—*Deed under s.* 192— *Covenant with all the Creditors—Release.*

In a composition deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor of the one part, and all his creditors of the other part, the debtor covenanted severally with all his creditors to pay a certain composition :—

Held, that any creditor could sue on this covenant.

The deed, in consideration of the above covenant, released the debtor from all actions, debts, contracts, &c. :—

Held, that the general words of the release were to be restrained by the general provisions of the deed, and the deed was held valid.

DECLARATION, on a promissory note made by the defendant, with money counts.

Plea 3. That after action an indenture was made between the defendant and divers of his creditors, under s. 192 of the Bankruptcy Act, 1861, setting out the deed with the usual averments, and that "the defendant has been, and is, by means of the premises, since the commencement of this action, released and discharged from the plaintiff's claim."

The deed was made between the debtor of the one part, and *all* his creditors of the other part; and, after a recital that it had been agreed that the debtor should pay to his creditors a composition of 5*s.* in the pound, by three instalments, the debtor "covenanted with the said several creditors, and with each of them respectively, their and each of their executors, administrators, and assigns respectively," to pay "to the said creditors respectively, or to their respective executors, administrators, or assigns, the said composition of 5*s.* in the pound," by instalments as mentioned in the deed.

The creditors absolutely released the debtor from all actions, suits, debts, sum and sums of money, accounts, reckonings, contracts, agreements, promises, bills, notes, judgments, claims, and demands whatsoever, at law or in equity, reserving rights against third persons. And it was declared that the deed was intended to be a deed within the meaning of the Bankruptcy Act, 1861. No consideration for the release was given to the creditors by the deed, except the covenant above mentioned.

Demurrer and joinder.

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Nov. 20. *McIntyre*, in support of the demurrer, raised the preliminary objection that the plea was not formally pleaded to the further continuance of the action, and cited *Oppenheimer* v. *Grieves* (1), and *Morgan* v. *Harding* (2), but

[CHANNELL, B. referred to *Johnson* v. *Barratt* (3), and said that a plea in this form would clearly entitle the plaintiff to costs.]

The objection was then abandoned.

The substantial objections are, first, that the covenant is one on which a non-executing creditor could not sue. It is made with *all* the creditors, but this is too general a term to constitute a class capable of taking a covenant. To make it valid at all it must be restricted to the creditors who execute; but, if it were so construed, the deed would give the non-assenting creditors no consideration for their release, and would further create an inequality between them and assenting creditors. *Ex parte Cockburn* (4), *Chesterfield & Midland Silkstone Colliery Company* v. *Hawkins* (5), *Benham* v. *Broadhurst*. (6) Secondly, supposing the first objection to be unfounded, the deed is still unreasonable, both because it gives the debtor an absolute release in consideration only of his covenant to pay a part of what was due from him, and also because the release is in such general terms, that he will be discharged by it from legal liabilities for which he is by the deed under no obligation to pay any composition; the words of the release include "contracts, &c."

Jan. 17. *Holker*, in support of the plea. First, the covenant is one on which any creditor may sue. *Chesterfield & Midland Silkstone Colliery Company* v. *Hawkins* (5) proceeded on the ground that the deed was expressed to be made only with the executing and assenting creditors, and therefore, by the strict rule of law, that none but parties to an indenture can sue upon it, creditors not executing nor assenting could not sue on the covenant, though expressed to be made with all. But in this case *all* the creditors are expressed to be parties to the deed. *Ex parte Cockburn* (4) was decided on the ground of inequality, those who executed receiving the composition in cash, while the rest obtained only the debtor's promise; what is said there upon

(1) 7 H & N. 533; 31 L. J. (Ex.) 375.
(2) 11 W. R. 65.
(3) Ante p. 65; note p. 66.
(4) 33 L. J. (Bkr.) 17.
(5) 3 H. & C. 677; 34 L. J. (Ex.) 121.
(6) 3 H. & C. 472; 34 L. J. (Ex.) 61.

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the other point is only an obiter dictum. The only question, therefore, on this branch of the argument is whether the parties are sufficiently ascertained; and, on the maxim, id certum est quod certum reddi potest, they are so. The word *creditors* ascertains them by description, as in *Sunderland Marine Insurance Company* v. *Kearney* (1), the co-plaintiff below was allowed to sue as a party interested, on a covenant under seal to make good damage to the subject matter of the policy; and the covenant being clearly several, each creditor has an immediate and independent remedy.

[POLLOCK, C.B. Certainly, if one were to covenant with persons under the description of all the members of a corporation, or of a firm, at a particular time, it would be valid; the only question is whether the description of the covenantees as creditors is not too vague and general. It is quite clear that the covenant is several.]

One difficulty on this branch of the subject is removed by *Whittaker* v. *Lowe* (2), which decides that secured creditors are to be reckoned. (3) The defendant's view is supported by the judgment of Blackburn, J., in *Dingwell* v. *Edwards* (4), which was not dissented from on this point by the judges whose opinions were against the deed; and the point is in effect decided in the defendant's favour by *Dewhurst* v. *Jones* (5), in the judgment of the court delivered by Bramwell, B. Secondly, as to the inadequacy of the consideration, *Johnson* v. *Barratt* (6) is conclusive in the defendant's favour; see also *Stone* v. *Jellicoe* (7); and, as to the extent of the release, *Hazelgrove* v. *House* (8) shews that it will be confined to such liabilities as may be the proper subject of a composition.

McIntyre, in reply. A distinction must be made between a covenant in a deed poll, which may be made with any number of persons, and a covenant in an indenture, which can only be made

(1) 16 Q. B. 925; 20 L. J. (Q. B.) 417.
(2) Ante p. 74.
(3) See also *Woods* v. *De Mattos*, ante p. 91, which decides that the word *creditors* in 24 & 25 Vict. c. 134, means all persons who could prove in bankruptcy.
(4) 33 L. J. (Q. B.) 161, 167.
(5) 3 H. & C. 60; 33 L. J. (Ex.) 294.
(6) Ante p. 65.
(7) 3 H. & C. 263; 34 L. J. (Ex.) 11.
(8) Law Rep. 1 Q. B. 101.

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with persons named as parties. In the cases cited of *Dingwell* v. *Edwards* (1), and *Dewhurst* v. *Jones* (2), the point was not argued.

Jan. 18. The judgment of the Court (Pollock, C.B., Martin, Channell, Pigott, BB.) was delivered by

POLLOCK, C.B. In this case, which was argued before us yesterday, the only point of importance was that which was raised in *ex parte Cockburn* (3), as to the power of creditors to sue on a covenant in this form. On that point we reserved judgment, and we have since found a case of *Lay* v. *Mottram* (4), lately decided in the Court of Common Pleas. In that case, in answer to an action on bills of exchange, a composition deed was pleaded, which we cannot distinguish from the present one. The Court there held the plea to be good, and gave judgment for the defendant. On the authority of that case we give judgment for the defendant.

Judgment for the defendant.

PARKER *v* TOOTAL.

Jan. 25.

IN this case, reported *ante* p. 41, the rule was drawn up in the following form :—"It is ordered that the master review his taxa-

(1) 33 L. J. (Q. B.) 161, 167.

(2) 3 H. & C. 60; 33 L. J. (Ex.) 294.

(3) 33 L. J. (Bkr.) 17.

(4) 19 C. B. (N. S.) 479. In that case the deed was made between the debtors, a surety, and all the creditors; and it recited that the debtors were jointly indebted to the persons and companies whose names or whose trading firms and companies were set out in the schedule (which schedule was intended to include all the creditors of the debtors), in the sums set opposite to each name, firm or company, and upon the several bills of exchange and negotiable securities mentioned in the schedule (as the debtors did thereby respectively admit and acknowledge, and as the creditors did thereby respectively declare), and that the debtors had agreed to pay a certain composition, and that the creditors had consented to accept such composition, to be secured by the joint and several promissory notes of the debtors and the surety. The deed contained no express covenant, and gave no other consideration to the creditors; and it absolutely released the debtors. The Court referring to *Farrall* v. *Hilditch*, 5 C. B. (N. S.) 840; 28 L. J. (C. P.) 221, held that the recital created an implied covenant, and upheld the deed.

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tion of the defendant's costs herein, by disallowing the costs of the action, and also the costs of the proceedings in error incurred prior to the entry of the suggestion of the death of the deceased claimant, John Barrow, in Michaelmas Term, 1861."

Cleasby, Q.C., in the course of the term, referring to the above report, applied to have the rule amended, by striking out so much of it as disallowed the costs in error prior to the suggestion. He did not ask to have the case reargued on this point, but only desired the Court to state whether they had in fact meant to disallow these costs.

The Court said they would consider the matter, and on a subsequent day.

Jan. 25. CHANNELL, B., said: In this case, which was an application for an order directing the master to review his taxation, the Court made the rule absolute, and the rule, as drawn up, directed the master to review his taxation by disallowing the costs of the action, and also the costs of the proceedings in error, prior to the entry of the suggestion of the original plaintiff's death. There were three classes of costs before the master: first, the costs incurred in the court below; second, the costs in error before the suggestion; third, the costs in error subsequent to the suggestion. *Mr. Cleasby* thought that the Court only intended to disallow the costs in the court below, and not the costs in error before the suggestion, and he applied to us to amend the rule—not asking us to reconsider the question, but to state what was in fact our intention. We have considered the matter, and read the report of the case, and we think that the rule has been drawn up correctly, and in accordance with the intention of the Court. (1)

(1) The judgment of the Exchequer Chamber having been allowed to go to the House of Lords without raising the question of the liability of Tootal to any of the costs in error, that point was not contested on his behalf in this court, and the application was accordingly confined to the costs included in the rule.

NOBLE *v.* WARD AND OTHERS.

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Jan. 12.

Statute of Frauds (29 *Car.* 2, *c.* 3) *s.* 17—*Parol Variation of a Written Contract—Substituted Contract—Rescission.*

The plaintiff made a contract in writing, with the defendant, for the sale of certain goods of more than 10*l.* in value, at specified prices, to be delivered within a specified time. Subsequently and before the time for delivery had arrived, a parol agreement between the parties was entered into, whereby the time for delivery was extended:—

Held, that the subsequent parol agreement was not "good" for any purpose under 29 Car. 2, c. 3, s. 17, and could not operate either as a rescission of the original written contract, or as a new contract for the sale of goods, and that the original written contract might therefore be enforced.

Moore v. *Campbell*, 10 Ex. 323, followed.

ACTION for non-acceptance of goods. The first count of the declaration stated that it was agreed between the plaintiff and the defendants that the plaintiff should sell and deliver to them, and that they should accept from him, within a certain agreed period, which had elapsed before action, a quantity of cloth at certain prices therefore to be paid by the defendants, and then agreed upon between the plaintiff and the defendants; yet the defendants refused to accept or pay for the cloth, although all things were done, &c., whereby the plaintiff lost the difference between the agreed price and the lower price to which the goods sold fell. The second count was for money payable for goods bargained and sold, goods sold and delivered, and for money due on accounts stated.

The defendants, as to the first count, pleaded (1) *Non assumpsit.* (2) Traverse that the plaintiff was ready and willing to deliver the cloth within the agreed period. (3) That it was one of the terms of the alleged agreement, that the cloth agreed to be sold and delivered should be of the same material, and as well made, as a sample piece then shewn and delivered by the plaintiff to the defendants; and that the plaintiff was not ready and willing to deliver cloth of the same material and as well made as the sample piece. (4) Rescission of the alleged agreement. (5) To the second count, never indebted. Issues thereon.

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The cause was tried before Bramwell, B., at the Manchester Summer Assizes, 1865, when the following facts were proved:—

The plaintiff is a manufacturer, and the defendants are merchants, at Manchester. On the 12th August, 1864, the defendants gave to the plaintiff's agent an order for 500 pieces of 32-inch grey cloth at 38*s.* 9*d.*, and 1000 pieces of 35-inch grey cloth at 42*s.* 1½*d.*, the deliveries to commence in three weeks, and to be completed in eight to nine weeks. On the 18th of the same month a second order was given by the defendants for 500 pieces of 32-inch grey cloth at 39*s.* and 100 pieces of 35-inch grey cloth at 42*s.* 3*d.*, to be delivered "to follow on after order given 12th instant, and complete in ten to twelve weeks." The plaintiff, on the 10th and 19th September made a first and second delivery on account of the first order. Considerable discussion ensued, both as to the time of delivery and as to the quality of the goods delivered; and eventually, on the 27th September, the plaintiff had an interview with the defendants, at which it was agreed that the goods delivered under the first order should be taken back, that that order should be cancelled, and that the time for delivering the goods under the second order should be extended for a fortnight. Goods were tendered to the defendants by the plaintiff in time either for the fulfilment of the agreement of the 18th August or of that of the 27th September; but the defendants refused to accept them on various grounds—amongst others, on the ground that they were not of the stipulated quality. The plaintiff thereupon brought this action. The declaration was framed so as to fit either the agreement of the 18th August or that of the 27th September. The learned judge directed a nonsuit to be entered, being of opinion that the contract of the 18th August was no longer in existence, the parol agreement of the 27th September having rescinded it; and that the latter agreement could not be resorted to, not being in writing, in accordance with s. 17 of the Statute of Frauds (29 Car. 2, c. 3). That section provides that "no contract for the sale of any goods, wares, or merchandizes for the price of 10*l.* sterling or upwards shall be *allowed to be good.* . . . . unless some memorandum or note in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized."

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A rule *nisi* was obtained in Michaelmas term, 1865, for a new trial, on the ground that the plaintiff was entitled to recover on the contract of the 18th August.

Holker and *Baylis* shewed cause:—1st. The nonsuit was right. The agreement of the 27th September was a material alteration of that of the 18th August, and supported the plea of rescission; *Stead* v. *Dawber*. (1) But not being in writing, it cannot be "allowed to be good" within the meaning of 29 Car. 2, c. 3, s. 17, as a contract for the sale of goods, though it is good as a rescission of the former contract: *Goss* v. *Lord Nugent*. (2) In *Moore* v. *Campbell* (3), which will be relied on for the plaintiff, there was a parol agreement, beneficial to the plaintiff, to alter the place of delivery of goods according to the usage of a particular trade as to delivery, and it was held not to operate as a rescission. Here, however, the substituted agreement contains an alteration so material as to create a new contract. The time, which is of the essence of the contract, is altered by a fortnight. Unless, therefore, there can be no waiver by parol of a contract required by the Statute of Frauds, s. 17, to be in writing, the contract of the 18th August is gone entirely. But there is nothing in sec. 17 to say that a parol contract to abandon or put an end to another shall not be good. The opposite construction might lead to much hardship, for assuming the verbal contract to be valid for no purpose, one party might agree with the other to extend the time for delivery, and then, when it had become impossible to deliver in the time originally fixed, turn round and sue for non-delivery within the *non*-extended time. Secondly, assuming that the contract of the 18th August was still in force, it was not clear that the plaintiff was ready and willing to deliver.

Mellish, Q.C., in support of the rule. As to the second point, the contract of the 18th is vague as to time. The deliveries are to "follow on after order given 12th instant." Then the first contract is given up, and no complete deliveries really take place under it; but the plaintiff, it is submitted, was at liberty to take the utmost time under it, and then "follow on" with his deliveries under the second. The two contracts, at any rate, will bear this

(1) 10 Ad. & E. 57. (2) 5 B. & Ad. 58. (3) 10 Ex. 323; 23 L.J. (Ex.) 310.

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construction; and if it be the correct one, the plaintiff was ready and willing to deliver in time. Moreover, this objection was not taken at the trial.

[BRAMWELL, B. I think that an irresistible case ought to be shewn to support a nonsuit on a ground not taken at the trial.]

Secondly, on the main question; the agreement of the 27th September was void altogether. The words of sec. 17 of the Statute of Frauds are that no contract shall be *allowed to be good* unless certain requisites are complied with, which have not been complied with here. Ought it therefore to be allowed to be good to rescind a former contract? It should be good for no purpose; *Smith* v. *Hudson.* (1) The parties certainly never meant to get rid of the contract of the 18th August altogether.

[POLLOCK, C. B. Probably they meant to alter the written contract in one material particular, and to do no more.]

That they cannot do. With regard to *Stead* v. *Dawber* (2), and *Goss* v. *Lord Nugent* (3), they only prove what is an undeniable proposition, that the substituted contract cannot be recovered upon. In most cases neither party is prepared to perform the original contract, and therefore the question now raised seldom arises. *Moore* v. *Campbell* (4) is in point. The pleadings are similar to those in this case. "Another question raised," says Parke, B., "was as to the effect of the alteration by parol of the written contract to deliver goods on the quay, to be weighed by the landing-scales, and substitute a delivery from the warehouse." It was contended that this operated as a new contract, which was necessarily a waiver or discharge of the old one, and being made before the breach of the old contract, supported a plea of rescission. "We do not think," continues the learned Judge, "that this plea was proved by this evidence. The parties never meant to rescind the old agreement absolutely, which this plea, we think, imports. If a new, *valid* agreement, substituted for the old one before breach, would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance of part or all." So here, where there is nothing to shew an intention wholly *to*

(1) 34 L. J. (Q. B.) 145.
(2) 10 Ad. & E. 57.
(3) 5 B. & Ad. 58.
(4) 10 Ex. 323; 23 L. J. (Ex.) 310.

rescind the contract of the 18th of August, and where there is only an attempt to make a new contract for the sale of the goods, without complying with the provisions of the statute, the plaintiff may, if he pleases, revert to the written contract and recover upon it.

Cur. adv. vult.

Jan. 12. The judgment of the Court (Pollock, C. B., Bramwell, Channell, and Pigott, BB.) was delivered by

BRAMWELL, B. (1) This case was tried before me at Manchester, and the plaintiff was nonsuited. The case comes before us on a rule to set aside that nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded, among other things, that the contract had been rescinded, and that the plaintiffs were not ready and willing to deliver. The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery by the plaintiff to the defendants also at a future day was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived the plaintiff and defendants agreed, verbally, to rescind, or do away with, contract A, and to extend for a fortnight the time for the performance of contract B; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third contract, call it C. It was a contract in which all that was to be done and permitted on one side was the consideration for all that was to be done and permitted on the other. (See per Parke B. in *Marshall* v. *Lynn.*) (2) It remains to add that the declaration would fit either contract B or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My notes, and my recollection of my ruling, are that contract B was rescinded, and contract C not enforceable, not being in writing. I think that was wrong. Either contract C was within the Statute of Frauds, or not. If not, there was no need for a writing; if yes,

(1) This judgment was read by CHANNELL, B. (2) 6 M. & W. 117.

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it was because it was a contract for the sale of goods, and so within the seventeenth section of the statute. That says that no contract for the sale of goods for the price of 10*l.* or upwards shall be allowed to be good, except there is an acceptance, payment, or writing. The expression "allowed to be good" is not a very happy one, but whatever its meaning may be, it includes this at least, that it shall not be held valid or enforced. But this is what the defendant was attempting to do. He was setting up this contract C as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C was made was twofold. First, that the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once—was all one transaction, one bargain; and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone, and the parties remitted to their original contracts.

I think, therefore, that on principle it was wrong to hold that the old contract was gone. *Moore* v. *Campbell* (1) is an authority to the same effect. It is true that case may be distinguished on the facts, namely, that there what was to be done under the new arrangement in lieu of the old was to be done at the same time, so that it might well be the parties meant, not that the new thing should be done, but if done it should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is that the new agreement was void. The cases of *Goss* v. *Lord Nugent* (2), *Stead* v. *Dawber* (3), and others, only shew that the new contract C cannot be enforced, not that the old contract B is gone. I think it was not. Inconvenience and absurdity may arise from this. For instance, if the defendants signed the new contract, and not the plaintiff, the plaintiff would be bound to the old and the defendants to the new. Or, if in the course of the cause a writing turned up signed by the plaintiff, then they could first rely on the old, and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only.

(1) 10 Ex. 323; 23 L.J. (Ex.) 310. (2) 5 B. & Ad. 58. (3) 10 Ad. & E. 57.

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But then, it was said before us that the plaintiff was not ready and willing to deliver under contract B. Probably not, and he supposed contract C was in force. In answer to this the plaintiff contended before us that this point was not made at the trial, to which the defendants replied,—neither was the point that the old contract was in force. My recollection is so,—that the case was opened and maintained as on the new contract,—but I agree with Mr. Mellish, that a nonsuit ought to be maintained on a point not taken at the trial only when it is beyond all doubt. I cannot say this is. Consequently, I think the rule should be absolute, but under the circumstances the costs of both parties of the first trial ought to abide the event of the second.

CHANNELL, B. The case, in my brother Bramwell's opinion, turning on what was his own impression, he was desirous that this judgment should be read as his own judgment. But I am authorized by the Lord Chief Baron, and by my brother Pigott, to say that, although I have read it as the judgment of my brother Bramwell, it is a judgment in which we all agree.

Rule absolute.

Attorneys for plaintiff: *N. C. & C. Milne.*
Attorneys for defendants: *Reed & Phelps.*

SPENCER AND HEWITT *v.* DEMETT.

Jan. 17.

Bankruptcy—Proof—Equitable plea.

It is not a good equitable plea in bar to an action, that the defendant has been adjudicated bankrupt, and that the plaintiff has proved his cause of action under the bankruptcy.

5 Ch 488

To an action for goods sold, the defendant pleaded equitably, that after the plaintiff's claim accrued, and before writ, she had been adjudicated bankrupt, and that after writ and before declaration the plaintiff Hewitt had been duly appointed assignee, and had proved the debt now sued for, whereby the defendant was discharged, and that the said proof was still in force.

Demurrer and joinder.

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Holl, in support of the demurrer. The 182nd section of 12 & 13 Vict. c. 106, is in the same terms as 49 Geo. 3, c. 121, s. 14, and, therefore, the case of *Harley* v. *Greenwood* (1), which was decided on that section, is a direct authority against the present plea. In *Elder* v. *Beaumont* (2), the plaintiff sued on a covenant to pay premiums on a life policy; the debt which was secured by the policy had been barred by the defendant's *certificate*, and, the plaintiff having proved for a part only, the question was whether the whole debt was so satisfied as in equity to vacate the security; the court held that the statement in the plea, that the plaintiff had elected to take the benefit of the petition of bankruptcy in respect of the original debt, was a statement of fact, and on that ground gave judgment for the defendant on the demurrer; but the plea having been also traversed, and disproved on the trial, the plaintiff had judgment on the verdict. That case is therefore no authority against the plaintiffs, but the contrary. The fact that the plea is pleaded equitably can make no difference, for the judgment would none the less be final on such a plea. Although in *Ex parte Diack* (3), it was said that the court would grant a perpetual injunction, if it were satisfied that the debt sued on were the same as that proved, nothing was in fact done, and it is submitted that the injunction would only be until the bankruptcy was superseded. But even if it were otherwise, the court would not allow the present plea, since it would have the effect of putting an end to the debt. The proper mode would have been to apply to stay the action, or to apply in bankruptcy to expunge the proof.

Joseph Brown, Q.C., in support of the plea, admitting that, but for the Common Law Procedure Act, 1854, he would have no *locus standi*, contended that a perpetual injunction would be granted, as said in the case of *Ex parte Diack* (3), and that the plea was therefore good. If the bankruptcy were superseded the plaintiffs might apply to set aside the judgment.

THE COURT (Pollock, C.B., Martin, Channell, and Pigott, BB.) held that the judgment being final, the fact that the plea was pleaded equitably made no difference. The defendant had no right

(1) 5 B. & A. 95. (2) 8 E. & B. 353; 27 L. J. (Q.B.) 25. (3) 2 Mont. & A. 675.

to throw on the plaintiffs the burden of coming to set aside the judgment; and the case of *Harley* v. *Greenwood* (1) decided the point.

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Judgment for the plaintiffs.

Attorneys for plaintiffs: *Dodd & Longstaffe.*
Attorney for defendant: *Edward Lewis.*

COOK *v.* JAGGARD AND OTHERS.

Jan. 23.

Will—Construction—Specific devise—Residuary clause—General words.

By a will prior in date to the Wills Act, 1838, the testator, after directing all his debts, &c., to be paid out of his personal estate, proceeded to dispose of his property in these words: "All the rest of my worldly estate, both real and personal, I give, devise, and bequeath as follows:" [then followed two specific devises of certain copyhold premises to Susan W. and the heirs of her body] "and all the rest, residue, and remainder of my personal estate and effects wheresoever and whatsoever, and of what nature, kind, or quality soever the same may be, moneys, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter S. W. to and for her own use absolutely":—

Held, that the residuary clause did not pass to the devisee the remainder in fee of the copyhold premises specifically devised to her in tail, and that in respect of the reversion of these copyholds there was an intestacy.

Wilce v. *Wilce* (7 Bing. 664) commented on.

EJECTMENT by the plaintiff, as customary heir, against John Jaggard and others, for certain copyhold premises in their possession, situated in the parish of Chich St. Osyth, in the county of Essex.

The defendant Jaggard appeared and defended for the whole.

At the trial, before Pigott, B., at the Essex Summer Assizes, 1865, it appeared that the plaintiff claimed as heir-at-law of Nathaniel Cook, who purchased the land in dispute at various periods between the years 1792 and 1803. Cook died in October, 1808, having previously made a will, of which the following are the material parts:—

"I, Nathaniel Cook, &c., publish this my last will and testament in manner and form following: that is to say, first, I desire

(1) 5 B. & A. 95.

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that all my debts, &c., be paid out of my personal estate and effects, and all the rest of my worldly estate, both real and personal, I give, devise, and bequeath as follows [then followed a devise of certain copyholds, in the occupation of J. B., to Susan Cook Westbroom and the heirs of her body, and a second devise of certain other copyholds, in the occupation of the testator, to the same Susan Cook Westbroom and the heirs of her body], and all the rest, residue, and remainder of my personal estate and effects wheresoever and whatsoever, and of what nature, kind, or quality soever the same may be, moneys, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter, Susan Cook Westbroom, to and for her own use absolutely."

Susan Cook Westbroom entered, on the death of Cook, into possession of the estate devised to her. She married Benjamin Jaggard, the father of the defendant Jaggard, and by him had two children. In 1817 she died, and the children died in 1815 and 1821 respectively, thus exhausting the specific devise in tail. Benjamin Jaggard was admitted on his wife's death, by the custom of the manor, as tenant for life, and remained in possession until the 29th of November, 1864, when he died, leaving two sons by a second wife, one of whom was John, the defendant, who continued to occupy the premises, asserting a right to them under the residuary clause of the will of Nathaniel Cook. The question between the parties, therefore, was whether there was an intestacy on the expiration of the estate tail limited by the will as to the copyhold premises devised to Susan Cook Westbroom, or whether the remainder in fee to them passed under the words of the residuary clause.

The learned judge directed a verdict for the plaintiff for the whole of the property claimed, leave being reserved to move to set it aside, and enter a verdict for the defendant, on the ground that, on the true construction of the will of Nathaniel Cook, the whole of his estate in the copyhold premises in question passed to the devisee, and that there was no intestacy as to the remainder after the estate tail created in her favour.

A rule *nisi* having been obtained in Michaelmas Term, 1865, in pursuance of the leave reserved,

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M. Chambers, Q.C., and *A. L. Smith*, shewed cause. 1st. In this case the maxim *noscitur a sociis* is applicable, and the context restrains the words used in the residuary clause to personalty only: *Doe d. Bunny* v. *Rout* (1); Jarman on Wills, 3rd ed. 681; *Woollam* v. *Kenworthy*. (2) In *Monk* v. *Mawdsley* (3) similar words were held to be confined to personal estate, and incapable of extending a previous life interest in realty given by the will. 2ndly. Assuming the words capable of passing real estate, at most only a life interest can pass, there being no words of limitation, nor *clear* intention to dispose of the fee simple. The Wills Act, 1838 (7 Wm. 4, 1 Vict. c. 26, s. 28), directing that a devise without words of limitation shall be construed as passing a fee simple, does not apply, this will having been made prior to that enactment.

Philbrick, in support of the rule. The words in the residuary clause pass the remainder in fee of the copyholds. The clause must be read with the rest of the will, and as if it followed directly on the words at the commencement, "all the rest of my worldly estate both real and personal;" and so reading it, the words "whatever I am possessed of or entitled to" are not limited by the context, and the maxim *noscitur a sociis* does not apply: *Smith* v. *Coffin* (4); *Hogan* v. *Jackson* (5); *Doe d. Andrew* v. *Lainchbury*. (6) *Wilce* v. *Wilce* (7) is in point. There the testator commenced his will thus: "As touching such worldly property wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in manner following;" and after several specific bequests and devises, concluded, "all the rest of my worldly goods, bonds, notes, book debts, and ready money, and everything else I die possessed of, I give to my son George." It was held that these words passed the lands of the testator not specifically devised.

[CHANNELL, B. In that case there was no preliminary specific devise of the property whereof the remainder was held to pass under the residuary clause. Have you any case where a similar

(1) 7 Taunt. 79.
(2) 9 Ves. 137.
(3) 1 Sim. 286.
(4) 2 H. Bl. 444.
(5) Cowp. 299.
(6) 11 East. 290.
(7) 7 Bing. 664.

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clause has been held to pass the remainder of the very property specifically devised in a former part of the will?]

No; but the same principle of interpretation must govern in both cases. Again, the intention of the testator in the present case clearly was to dispose of his whole property; but unless the remainder in the copyholds passes by the residuary clause, there is a partial intestacy. As to the second point, there are many instances previous to the Wills Act, 1838, where a fee simple has been held to pass without words of limitation where the intention of the testator was clear. Here there is a clear intention to dispose of his whole estate. *Wilce* v. *Wilce* (1) is an authority on this point also. There Bosanquet, J., says: "I think that, under the language of the residuary clause, the defendant was entitled to take real estate; and if entitled at all, he was entitled in fee."

[MARTIN, B. That case is no authority to shew that a fee simple passed. All that was necessary to decide was that *some* real estate passed.]

POLLOCK, C.B. I think that this rule should be discharged. Looking at the whole of the will, it is clear that whether or not the testator manifests an intention to part with his whole property, he has not used language capable of effecting that object. The beginning of the will, no doubt, expresses an intention to dispose of the whole property. Then the testator proceeds specifically to devise two copyhold estates to his daughter, Susanna Cook Westbroom, and the heirs of her body, and then follows the residuary clause. The whole of this clause appears to be confined to personalty, of which the testator enumerates the various kinds, *e.g.* moneys and securities for money. Then come the words "or whatever I may be possessed of or entitled to" following the description given of the property bequeathed as "moneys, &c.," and coupled with that description by the word "or." That, I think, shews that the words refer to property *ejusdem generis* with "moneys, &c.;" and it may be observed also that the testator uses the word "bequeath." In *Wilce* v. *Wilce* (1) the words were, "*and* everything else I die possessed of," thus making,

(1) 7 Bing. 664, 675.

as it were, a new head of property. This residuary clause, therefore, in my opinion, only applies to personal property; but assuming the contrary, it may be observed that *Wilce* v. *Wilce* (1) really only decided that *some* real property passed under the residuary clause, and not that a fee simple passed. The present case, then, is distinguishable from that one, and is rather governed by *Monk* v. *Mawdsley*. (2) I think the whole tenor of the will shews that the residuary clause applies to personal estate only.

MARTIN, B., concurred.

CHANNELL, B. I am of the same opinion. It has been argued that the words in this residuary clause pass an estate in fee in the copyhold premises, but I do not think they can be held to do so. At first I thought the case of *Wilce* v. *Wilce* (1) in point as to the fee passing, but, on careful consideration, it does not seem to be so. When we look at the question stated for opinion there, it is whether a certain estate passed to the tenant either in fee simple or for life, and it was not necessary to say in the result which of the two estates the plaintiff took. All that that decision settles is that, under the words used, some realty passed. It is true that in the present case the will shews an intention to dispose of the whole property, and not to die intestate as to any part of it; but although this may assist the construction contended for, it does not by itself make it the right one. It seems to me that the case of *Monk* v. *Mawdsley* (2), alluded by the Lord Chief Baron, is in point, and that this rule should be discharged.

PIGOTT, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Treherne & Co.*
Attorneys for defendants: *N. C. & C. Milne.*

(1) 7 Bing. 664. (2) 1 Sim. 286.

Jan. 25.

DIAMOND *v.* SUTTON.

Practice—Writ for service out of the jurisdiction under s. 18 *of the Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76.)

A writ having been issued for service out of the jurisdiction under 15 & 16 Vict. c. 76. s. 18, the defendant applied on affidavit to set it aside, on the ground that the cause of action did not arise within the jurisdiction; and the Court not being satisfied that the plaintiff did not intend to sue for matters not arising within the jurisdiction, made an order to set aside the writ, unless the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction and to confine himself to that cause of action.

5 C.B.N.S. 542-3, 545-6, 7 P.D. 31, 7 C.L.D. 10

This was an application to set aside a writ issued for service out of the jurisdiction, under 17 & 18 Vic. c. 125, s. 18.

The defendant, without appearing to the writ, applied to Martin, B., at Chambers to set it aside, on the ground that there was no cause of action arising within the jurisdiction. In his affidavit in support of the application, he stated that before being served with the writ he had received two letters from the plaintiff's attorney, demanding an apology for certain statements contained in a newspaper called the *Photographic Notes;* that from that circumstance he believed that the damages claimed in the writ were in respect of such statements; and that, save as above mentioned, he had never had any transactions with, or in relation to, the plaintiff, nor heard any alleged, from which any cause of action could arise; and that none such had been alleged to have arisen save as aforesaid; that he then resided, and had for eighteen years previous continuously resided, in Jersey, out of the jurisdiction; that the *Photographic Notes* were wholly edited and printed at St. Heliers, in Jersey, and were also published there; that some copies of them were sent to England for sale, and were from time to time sold here; and that he was not the proprietor, nor part proprietor, nor the publisher of the newspaper.

The affidavit in answer made by the plaintiff's attorney stated, that the action was brought for a libel contained in certain numbers of the *Photographic Notes,* and also for a libel contained in a

letter written in Jersey by the defendant, and sent by him through the post to, and received by, the plaintiff's attorney in London, which letter was also published in the *Photographic Notes*. The letter, and the numbers of the *Notes* in question (being some of the copies circulated in England), were made exhibits, and it appeared from them, and it was stated in the affidavit, that the *Notes* were also published in London by Sampson Low & Co. (bearing their name instead of that of the Jersey publisher), that they bore the name of the defendant as editor, and were registered for transmission abroad; and the affidavit also stated the belief of the deponent, that their sale and circulation in Jersey was very limited compared with that in England and elsewhere. In one of the numbers of the *Notes* which was made an exhibit, the following words occurred in an editorial article:—"As this, unfortunately, is the only independent and plain-spoken journal *in England*."

The substance of the alleged libel contained in the *Notes* was, the imputation of corrupt motives to the plaintiff in his conduct as a juror appointed to award a medal for photographic lenses; and the letter sent to the plaintiff's attorney was in substance an attempt to justify the charge.

The learned Baron offered to dismiss the application if the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction, and to confine himself to that cause, and on this being declined, he referred the matter to the Court.

Jan. 25. *J. O. Griffits* moved, accordingly, to set aside the writ. This course is necessary, since appearance to the writ would waive the objection to the jurisdiction, *Forbes* v. *Smith* (1), and the application is sanctioned by *Binet* v. *Picot*. (2) It is doubtful whether the alleged libel is not within the bounds of legitimate comment on a public matter; it is at least very doubtful whether the cause of action (if any) arose within the jurisdiction. This being so, the plaintiff ought not to be allowed to compel the defendant's appear-

(1) 10 Ex. 717; 24 L. J. (Ex.) 167.
(2) 4 H. & N. 365; 28 L. J. (Ex.) 244.

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ance without giving some security that, after having done so, he will not in his declaration state, or in his evidence prove, some cause of action which did not arise within the jurisdiction, and which by itself would clearly not have entitled him to issue the writ.

[MARTIN, B. I thought there was clearly a publication here, but that the plaintiff ought not to be at liberty to sue for other matters under cover of this cause of action, otherwise he might bring the defendant here on a bill of exchange, and then sue him for an assault in Jersey.]

Day showed cause against the rule. The application is premature. If the cause of action did not arise within the jurisdiction the defendant need not take any notice of the writ; the plaintiff must then, under s. 18, apply to a judge for leave to proceed, and he must, on doing this, satisfy the judge by affidavit that a cause of action arose within the jurisdiction. If, then, he afterwards in his declaration went beyond the cause of action so shown by affidavit, the defendant might apply to strike out the additional matter; or if in his evidence he failed to show that the cause of action did in fact so arise, it would be a matter for the judge at the trial, or it might be ground for an application to the discretion of the Court to set aside a judgment so obtained. But upon the materials before the Court there is abundant evidence of a cause of action so arising, and the plaintiff, showing this, is entitled to his writ.

[MARTIN, B. But for the act, the plaintiff could not sue at all; the act allows him to sue a defendant residing out of the jurisdiction for acts committed here; but it is an abuse of the act if, under its powers, he brings the defendant here, and then includes in the same action matters occurring elsewhere, and for which the act does *not* give him power to sue; and the defendant is entitled to ask for protection against this abuse.

[CHANNELL, B. The word "satisfied" in s. 18 seems to give a kind of discretion to the judge; it is true that this is not an application for "leave to proceed" under that section, but in its jurisdiction over its own process the Court is, I think, entitled to

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exercise a similar discretion, in order to be satisfied that that process will not be abused. I see no reason why we should be satisfied, if the plaintiff refuses to give the undertaking.]

Per curiam.—(POLLOCK, C.B., MARTIN, CHANNELL, and PIGOTT, BB.)

Rule absolute to set aside the writ unless the undertaking were given by Monday (Jan. 29). (1)

Attorney for Plaintiff: *W. W. King.*

Attorneys for Defendant: *Hancock, Saunders, & Hawksford.*

ALEXANDER AND ANOTHER *v.* JONES.

Jan. 30, 31.

Costs—Concurrent Jurisdiction—Dwelling place—County Court—9 & 10 *Vict. c.* 95, *s.* 128.

A person who has no permanent place of abode "dwells," within the meaning of 9 & 10 Vict. c. 95, s. 128, at the place at which he may be *temporarily* residing.

THIS was an application by the plaintiffs for the costs of an action brought by them against the defendant in this court, to recover the sum of 36*l.* 7*s.* 5*d.*, due for work done and materials provided, &c. The defendant paid 15*l.* 7*s.* 6*d.* into court, which the plaintiffs accepted in full satisfaction of their claim. The amount recovered being less than 20*l.*, an application was made at chambers under 15 & 16 Vict. c. 54, s. 4, to Martin, B., for an order for the payment of the plaintiffs' costs, on the ground that the superior courts had concurrent jurisdiction with the county courts, because the parties "dwelt" (within the meaning of 9 & 10 Vict. c. 95, s. 128) more than twenty miles apart, and the cause of action did not arise either wholly or in any material point within the district in which the defendant dwelt or carried on business. The learned Judge having declined to make the order, a rule *nisi* was obtained (January 23), calling on the defendant to

(1) The undertaking was afterwards given by the plaintiff's attorney, and was in this form:—"I hereby undertake on the part of the plaintiff, to prove a cause of action has arisen within the jurisdiction of this Court, against the above-named defendant (who is a British subject, and resides at Jersey), pursuant to the 18th section of the Common Law Procedure Act, 1852."

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shew cause why the plaintiffs should not recover their costs, and why the master should not tax the same.

The facts of the case, as they appeared from the affidavits, were as follows :—

The plaintiffs, at the time of the commencement of the action, resided and carried on business at Bristol, within the jurisdiction of the Bristol county court, and at the same time the defendant was residing at Garthbeibio Rectory, near Welchpool, within the jurisdiction of the Montgomeryshire county court and more than twenty miles from the plaintiffs. The cause of action arose at Bristol. The writ in the action was issued on the 29th of November, 1864. Up to the 10th of the previous month the defendant's place of abode had been at the Royal Hotel, Clevedon, within the jurisdiction of the Bristol county court. He had lived and carried on business there for three years and upwards previous to that day, when he sold off his business and left Clevedon. From the 10th to the 21st of October he stopped at an hotel in Bristol, and then went on a visit to a brother-in-law at Garthbeibio. Whilst living there he received, on the 18th of November, a demand from the plaintiffs for the amount alleged to be due, and on the 6th of December he was, whilst on his way back to Bristol, served at Welchpool with the writ in this action. Since the 10th of October the defendant had never returned to live at Clevedon, and was not shewn to possess a permanent abode either there or anywhere else.

The 9 & 10 Vict. c. 95, s. 128, enacts that "all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff *dwells* more than twenty miles from the defendant, or where the cause of action does not arise wholly or in some material point within the jurisdiction of the court within which the defendant *dwells*, or carries on his business, at the time of the action brought . . . . . may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed."

The 13 & 14 Vict. c. 61, s. 11, deprives a plaintiff recovering in the superior courts a sum not exceeding 20*l.* in actions of contract, of his costs; but by 15 & 16 Vict. c. 54, s. 4, power is given to the

Court or a Judge at chambers to make an order entitling the plaintiff to costs, upon his making it appear that his action was brought for a cause where, under the 9 & 10 Vict. c. 95, s. 128, the superior courts have concurrent jurisdiction.

H. Matthews shewed cause. The *onus* of proving that the superior courts have concurrent jurisdiction lies on the plaintiffs; but here they offer no proof that the defendant "dwelt," within the meaning of 9 & 10 Vict. c. 95, s. 128, anywhere but at Clevedon, within the jurisdiction of the Bristol county court. The defendant was merely a visitor at Garthbeibio, and had acquired no permanent residence there, *Butler* v. *Ablewhite* (1); dissenting from *Bailey* v. *Bryant* (2), and followed by *Pigrim* v. *Knatchbull.* (3) In *Macdougall* v. *Paterson* (4), a man having his permanent residence at one place, and a lodging for a temporary purpose only at another, was held not to "dwell" at the latter place.

[CHANNELL, B. There the defendant maintained his permanent residence whilst he was in the occupation of the lodging, but here the defendant abandoned his residence at Clevedon altogether.]

That is so; but here, although there is no double residence, in the absence of proof that the defendant has acquired a permanent abode elsewhere, he must be taken still to reside at Clevedon, his last known place of permanent residence.

Lumley Smith, in support of the rule. The defendant left Clevedon before the issue of the writ without any intention of returning. Thus he lost his residence there and had, at the time of action brought, no place of residence at all, except at Garthbeibio. It is said that he was only on a visit there, and that, his residence being merely transitory, he cannot be held to "dwell" there within the meaning of the 9 & 10 Vict. c. 95, s. 128; but where a man has abandoned his permanent abode, and is not shewn to have settled anywhere else, his "dwelling" is at the place in which he happens temporarily to be. In all the cases cited the defendant had two residences, one permanent and one temporary, but here he had only the latter. Having no fixed abode, therefore, he was properly sued in the superior court, *Rolfe* v. *Learmonth* (5); and in order to

(1) 6 C. B. (N. S.) 740; 28 L. J. (C. P.) 292.
(2) 1 E. & E. 340; 28 L.J. (Q.B.) 86.
(3) 34 L. J. (C. P.) 257.
(4) 11 C. B. 755; 21 L. J. (C. P.) 27.
(5) 14 Q. B. 196; 19 L. J. (Q. B.) 10.

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deprive the plaintiffs of costs he ought himself to have shewn affirmatively either that he did "dwell" within twenty miles of the plaintiffs, or else that the cause of action arose within the jurisdiction of the Montgomeryshire county court.

Cur. adv. vult.

Jan. 31. The judgment of the Court (Pollock, C.B., Martin, Channell, and Pigott, BB.) was delivered by

MARTIN, B. We have had an opportunity of conferring with some of the judges of the other courts as to this case, and are now of opinion that the plaintiffs are entitled to costs. The facts are, that both the plaintiffs and the defendant had until recently resided at Clevedon, within the jurisdiction of the Bristol county court; but the defendant had, at the time of action brought, left Clevedon so far as any permanent dwelling was concerned. He was visiting his brother-in-law at a place out of the jurisdiction of the county court, but had not acquired any permanent dwelling-place there, and in fact had no dwelling-place except his brother's house. He was there served with a writ issuing out of a superior court, and the question is, whether the plaintiffs are entitled to their costs of action on the ground that the case is one in which a superior court has a concurrent jurisdiction with a county court. On the best consideration we can give to the subject, we think that they are entitled to their costs. It is to be observed that jurisdiction is given to the county court by s. 60 of 9 & 10 Vict. c. 95, which provides that a summons may issue in any district in which the defendant shall dwell or carry on his business at the time of action brought; but it is only by leave of the court for the district in which the defendant shall have dwelt or carried on business within six months before the time of action brought, or in which the cause of action arose, that a summons may issue in either of the last-mentioned courts. Then s. 128 provides that where actions might before the act have been brought in one of the superior courts, there, if the plaintiff dwells within twenty miles from the defendant, or if the cause of action did not wholly, or in some material point, arise within the jurisdiction of the court within which the defendant dwells or carries on business, the action may be still brought in a superior court. We think that, if this

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defendant really had no dwelling-place, except that he dwelt as a guest with his brother-in-law in Montgomeryshire, he must be taken to dwell at the place where he was then abiding, though it may not have been his own house, and though such an abode might not constitute a dwelling if he had retained a permanent residence. We think, therefore, that the plaintiffs have brought themselves within the terms of s. 128, and the rule must be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Clarke, Woodcock, & Ryland.*
Attorneys for defendant: *White & Sons.*

BAXENDALE AND OTHERS *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Jan. 22, 31.

Railway—Carrier—Inequality of Charge.

The defendants, a railway company, were incorporated by an Act (4 & 5 Wm. 4, c. lxxxviii.), which contained an *equality clause* (s. 158) in the usual terms.

The defendants were in the habit of charging to the public on any consignment of goods made to one person, at the same time, though consisting of several distinct parcels, a tonnage rate on the aggregate weight of the whole:—

Held, that the fact that, of goods so consigned at the same time to one person, and distinctly addressed to him, some articles had also written conspicuously upon them the names of persons to whom the consignee intended to deliver them, did not entitle the defendants to charge separately for those on which such names were different. Therefore the plaintiffs, who were carriers, were held entitled to recover the difference between sums paid under protest on goods so consigned and addressed by them to themselves, but charged for separately on account of such second name appearing on them, and the amount which would have been payable on the aggregate weight of the consignment.

The defendants, in addition to their business of carriers by rail, carried on the business of common carriers off their line. They charged an equal rate to all the public for carriage on their line between their termini. They also undertook to collect at one terminus, to carry on their line, and to deliver at a place distinct from, and at some distance beyond, their other terminus; and for this they charged a through rate to all the public alike:—

Held, that the carriage beyond the second terminus was not auxiliary to their business as railway carriers, but was done by them in their business as common carriers generally, and that the plaintiffs were not entitled to deduct the cost of this carriage, and of collection at the first terminus, from the through rate, and to claim to have their goods carried between the termini for the difference.

DECLARATION, containing counts for work done, money paid, money received, and on accounts stated.

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BAXENDALE v. LONDON AND SOUTH WESTERN RAILWAY CO.

Pleas, 1. Payment into court of 9*l.* 2. To the residue of plaintiffs' claim, never indebted. Issue.

At the trial of the cause before Martin, B., at the sittings at Guildhall, after Trinity Term, 1864, a verdict was entered for the plaintiffs, subject to a special case, which stated as follows:—

The plaintiffs are common carriers, conveying goods to and from various parts of England, and employing various railway companies in their carriage.

The defendants' railway runs (amongst other places) from Nine Elms station, London, to Guildford and to Southampton. By the act which incorporated them, 4 & 5 Wm. 4, c. lxxxviii., it is provided (s. 149) that they may take tonnage rates for certain goods at 3*d.* per ton per mile, for certain other goods at 6*d.* per ton per mile. By s. 155, they may make orders for fixing the sums to be charged by the company for small parcels not exceeding 500 lbs. weight, and may from time to time vary and repeal the same, "provided always, that the provisions hereinbefore contained as to parcels shall not extend to goods, articles, matters, and things sent in large aggregate quantities, although made up of separate and distinct parcels, but only to single and undivided parcels."

By s. 156, the company are authorized to carry on their railway all such goods, &c., as shall be offered to them for that purpose, and all such persons as shall apply to be carried along the said railway or any part thereof, and to demand for such carriage, in addition to the usual rates and tolls by the act authorized to be charged and received, such sums of money as the company or directors may from time to time fix and require.

By s. 158, "it shall be lawful for the said company, from time to time, and so often as they shall think fit, to reduce all or any of the rates, tolls, or sums by this act authorized to be taken, and afterwards, from time to time, again to raise the same, or any of them, so that the same respectively shall not at any time exceed the amount by this act authorized. *Provided always*, that the said company shall not partially raise or lower the rates, tolls, or sums payable under this act, but all such rates, tolls, and sums shall be so fixed as that the same shall be taken from all persons alike, under the same or similar circumstances."

The defendants carry on the ordinary business of a railway

company upon their line, and also carry on the business of common carriers between the stations mentioned above and the other stations upon their line, and also between their several stations and places beyond the limits of their line.

The grounds of complaint alleged by the plaintiffs against the defendants, and in respect of which this action was brought, were in respect of,

1. Overcharges upon consignments of goods, by charging for their carriage rates according to the weight of packages contained in these consignments taken separately, instead of a tonnage rate upon the whole of the consignments by the plaintiffs of the same class of goods.

2. Overcharges in not allowing to the plaintiffs a sufficient deduction or rebate for the collection, delivery, and cartage of goods, both in London and in the country, when those services were not performed by the defendants.

3. Overcharges, by charging upon goods carried for the plaintiffs by the defendants, from Nine Elms to Southampton station, thence to be forwarded by the plaintiffs to the Isle of Wight, rates which are higher than those charged to other persons under the same or similar circumstances.

The facts were as follows :—

As to the first claim—The defendants are in the habit of charging for goods carried by them on their line, upon goods weighing over 1 cwt., a tonnage rate, and upon articles under that weight, a small parcels rate, which is considerably higher than the tonnage rate.

When goods are delivered to the defendants for carriage by one person, in a single consignment, at one and the same time, and are addressed to the same consignee, the defendants are in the habit of adding together the weight of all such small packages under 1 cwt., and charging for them upon their aggregate weight.

The plaintiffs are in the habit of sending by the defendants, from one station on their line to another, consignments of goods, each consignment frequently consisting of a number of small parcels. These goods are delivered by the defendants to the plaintiffs at the station whence they are to go, directed and consigned to the plaintiffs at the station to which they are to be carried, and

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where they are to be delivered to the plaintiffs; and at such last-mentioned station are received by the plaintiffs from the defendants. With each consignment the plaintiffs deliver to the defendants a ticking-off note, containing the name of the plaintiffs' firm as the consignors, and also as the consignees of the goods, the description (but not the weight) of the goods, and the station to which they are to be carried. Each package is labelled with a label, in this form, "PICKFORD & Co., GUILDFORD STATION," printed in plain letters, and many of the packages have in addition, conspicuously shown, the names and addresses of the persons to whom the plaintiffs intend to deliver them, according to the directions of their customers. When goods are delivered by the plaintiffs to the defendants, to be carried and delivered by the defendants for the plaintiffs to persons other than the plaintiffs, the names of such other persons are inserted as consignees in the consignment note or declaration, and the goods are addressed to them only, without the above-mentioned label.

Down to 29th February, 1864, the defendants charged a tonnage rate on the aggregate weight of consignments labelled, directed and consigned to the plaintiffs as above-mentioned; but on and after the 1st March, in that year, the defendants, in pursuance of a notice previously given to that effect, altered the system, and charged the plaintiffs separately for each package contained in each consignment so labelled, directed, and consigned, at the tonnage rate or small parcels rate, according to the weight of each package singly, wherever the names of the parties to whom the plaintiffs intended to deliver them appeared on the packages; except that where the same name appeared on two or more packages in the same consignment they charged the tonnage rate upon the aggregate weight of these packages. No difference was made by the defendants in thus charging the plaintiffs, and in charging any others of the public who sent goods under similar circumstances.

Various sums had, between the 1st and 26th March, 1864, been charged by the plaintiffs to the defendants, according to the altered system, for goods so labelled, directed, and consigned as above-mentioned, which sums the plaintiffs had paid under protest; and the difference between these sums and the tonnage rate on each consignment, the plaintiffs now sought to recover.

As to the second claim,—the principle of which was settled by *Re Baxendale* v. *Great Western Railway Company* (1), and *Re Garton* v. *Great Western Railway Company* (2), the findings of the special case shewed that a sufficient deduction had not been made, and that part of the case was accordingly abandoned on the argument by the counsel for the defendants.

As to the third claim,—the plaintiffs, in the course of their business as carriers, are in the habit of carrying goods for their customers from London to Cowes and Newport, in the Isle of Wight. In so doing they make use of the defendants' line from Nine Elms station to Southampton station, where the goods are consigned to themselves, and whence they themselves carry them on to Cowes and to Newport. For the carriage of the goods between the stations, the defendants charge them and the rest of the public alike, 11*s.* 8*d.*, 16*s.* 3*d.*, and 19*s.* 7*d.* per ton, according to the class of the goods.

The defendants, by arrangements with owners of steamboats and sailing-vessels, in their capacity of carriers, themselves also carry goods by their railway from London to Cowes and Newport, charging 20*s.* and 26*s.* 8*d.* per ton, according to the class of the goods. These charges include collection in London, and cartage to Nine Elms, conveyance on the line thence to Southampton station, carriage by tramway from that station to the wharf, wharf dues, and carriage by boats from Southampton to Cowes and Newport, but *not* delivery beyond the quays at Cowes and Newport.

The actual cost to both plaintiffs and defendants, of collection and cartage to Nine Elms, is 5*s.* per ton. The actual cost to the plaintiffs, and the fair market price of the conveyance of such goods from Southampton station to Cowes and Newport, is 8*s.* per ton. The actual costs to the defendants of the same transit is 5*s.* 4*d.* per ton. The plaintiffs therefore alleged that the actual charge made by the defendants to their Cowes and Newport customers, for the carriage of their goods of the first class above mentioned from Nine Elms to Southampton station, was only 7*s.* per ton, (*i.e.* 20*s.* *minus* 5*s.* and 8*s.*) and claimed to have their own goods carried at that rate; and having, between January 1 and

(1) 5 C. B. (N. S.) 336, 356; 28 L. J. (C. P.) 81.

(2) 5 C. B. (N. S.) 669; 28 L. J. (C. P.) 158.

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March 26, 1864, sent by the defendants' line from Nine Elms to Southampton, goods consigned to themselves at Southampton station (intended for Newport and Cowes, but not so declared), and having paid for their carriage, under protest, at the rates above-mentioned, they now claimed to recover the difference between the amount so paid and a charge at the rate of 7*s.* per ton. (1)

The question for the opinion of the Court was,—whether the plaintiffs were entitled to recover from the defendants the before-mentioned sums, or any and what part thereof.

Jan. 22. *Bovill, Q.C.* (*C. Pollock* with him), for the plaintiffs. As to the first point, there is a clear inequality in charging separately for parcels in one consignment, labelled in the manner described in the special case. The case finds that the company charge to the rest of the public a tonnage rate on each consignment for the same consignee, although made up of several parcels; but with respect to consignments made by the plaintiffs to themselves, the company claim to examine the other names and addresses written on the parcels, and to charge as though these were the names of the consignees. But it is clear that they have no concern with those persons; they could not legally deliver to them, nor to any other persons than the plaintiffs, nor do they pretend to have such a right. The names are on the same footing as private marks, containing a direction to the plaintiffs themselves, but as immaterial to the defendants as the colour of the paper. The ticking-off note itself, naming the plaintiffs both as consignors and consignees, constitutes the consignment ~~note~~, as much as if the separate parcels were enclosed in one piece of canvas, or connected by a string, and brings the case within section 149; but it is not necessary for the plaintiffs to contend this, for the case finds that the defendants take from others in this way, and by the equality clause the plaintiffs are entitled to be placed in the same position. The principle is settled by *Pickford* v. *Grand Junction Railway Company* (2), *Crouch* v. *Great Northern*

(1) There was a further statement in the case relating to special contracts, but this was not alluded to in the arguments or the judgment.

(2) 10 M. & W. 399.

Railway Company (1), and *Sutton* v. *Great Western Railway Company*. (2) The case does not find that any additional trouble or risk is caused to the company by the goods being sent in this mode.

As to the third point, this is, in fact, the same question as the second (3); it is an attempt to compel the payment of a delivery charge. In order to ascertain what the defendants ought to charge between London and Southampton, the charges for services of collection and delivery off the line at both ends are to be deducted; and there can be no difference between such services rendered, for instance, between Camden Town and Southwark, and similar services performed between Southampton and Cowes; it can make no matter whether the place of destination is this side or the other of a piece of water, nor, again, whether it is reached by a bridge or a boat.

[CHANNELL, B. No case has expressly gone so far as to say that when the charge on the line is the same, the railway company may not compete in through fares to places off the line, beyond the limits of their ordinary delivery.

MARTIN, B. Do you insist that between two stations on the defendants' line you could compel them to regulate their fares by an average of the distance all along the line? And what difference does it make that this place is beyond the line? Because they compete with you beyond the line, and succeed in carrying at a cheaper rate, can you insist on a deduction of the amount it costs you?]

It is not necessary to contend that the amount which it costs the plaintiffs should be deducted, although that is found to be the fair market price; even at their own rate of expense they do not make a sufficient deduction, for the cost per ton at the London end is found to be 5*s.*, and at the Southampton end 5*s.* 4*d.*; and if these sums be deducted from the through rate of 20*s.*, it will leave only 9*s.* 8*d.* instead of 11*s.* 8*d.* for the transit from Nine Elms to Southampton.

[PIGOTT, B. The plaintiffs must shew that the charge made to them is not the same as that made to other persons under the

(1) 11 Ex. 742; 25 L. J. (Ex.) 137. (2) 3 H. & C. 800.

(3) The second point being abandoned as above-mentioned was not argued.

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same or similar circumstances; but how do they shew that? To be in the same circumstances they must go to Cowes; but, in fact, they only go to Southampton. Is it not similar to the case of fares, say for instance, from London to Reading or to Brighton, lower than fares to intermediate stations?]

The fact that the transit there is entirely on the line is the essential difference; there is no competition in such a case; but off the line where competition exists, the effect of such charges as the present is to create an inequality, and to give the company a monopoly in a business foreign to the purpose of their constitution: see per Cockburn, C.J., in *Re Baxendale* v. *Great Western Railway Company* (1); *Same* v. *Same* (2); *Garton* v. *Bristol and Exeter Railway Company.* (3)

C. W. Wood (*Mangles* with him) for the defendants. First, as to the third point, the principle of all the cases decided on this subject is inequality, and no inequality is shewn. The complaint of the plaintiffs is not that they are charged more than the rest of the public from Nine Elms to Southampton station, nor that they are charged more than the rest of the public from London to the Isle of Wight, but simply that the defendants carry goods for other persons (as they would do for the plaintiffs) to another place off the line, at a rate lower in proportion than their charge for part of the distance. It is not disputed that they have a right to carry to that place, and the case is therefore in reality the same as that suggested by Martin and Pigott, BB., which was decided in favour of the company in *Re Jones* v. *Eastern Counties Railway Company* (4); see also *Hozier* v. *Caledonian Railway Company* there cited. (5) The cases cited upon the other side were all cases in which there was a through charge, including the cost of collection and delivery at the place to which the line went, and they decided only that the company were not entitled to charge, under the name of railway carriage, for services not performed on the line, in such a manner as to lay a burden upon those who did not wish to avail themselves of those services. Now, as to

(1) 5 C. B. (N. S.) 355; 28 L. J. (C. P.) 81.

(2) 14 C. B. (N. S.) 1; 16 Ib. 137; 32 L. J. (C. P.) 225; 33 Ib. 197.

(3) 6 C. B. (N. S.) 639; 28 L. J. (C. P.) 306.

(4) 3 C. B. (N. S.) 718.

(5) 17 Sess. Cas. (2nd S.) 302.

goods consigned to Southampton only, no such services are performed for any of the public, and therefore the application of those cases fails. But as to goods which the defendants carry to Newport, they go to Southampton only as they do to any intermediate station in the course of their transit. The quays at Cowes and Newport are the places which respectively correspond to the London terminus, and to give the cases cited a *primâ facie* application even, it would be necessary to shew a charge for delivery within *that* district included in the through rate, in the same manner as a charge for delivery in London was included in the through rate there. But there is no such charge, nor indeed any such delivery; and for the services which are rendered between Southampton and the Isle of Wight in the course of the through transit, the plaintiffs are not compelled to pay, but may, as in fact they do, have their goods carried to Southampton at the same rate as the rest of the public. If they can establish the present claim, no limit can be fixed where a similar claim would not prevail, and wherever the company take goods off the line in their business of common carriers, the plaintiffs will be entitled to interfere with their charges. But if they could succeed at all, they could, at any rate, claim only a deduction from the through rate, of so much as it actually costs the defendants to perform the additional transit. The notion of a market value, which is fixed by reference to their inferior appliances, is an absurdity, and the effect of calculating the proper charge by such a standard would only be to benefit them at the expense of the public: *Garton* v. *Bristol and Exeter Railway Company* (1), per Cockburn, C.J., and Crompton, J.

Secondly. As to the first point, the cases of *Baxendale* v. *Eastern Counties Railway Company* (2); and *Garton* v. *Bristol and Exeter Railway Company* (1), are almost decisive in the defendant's favour. It is a materially different question from that decided in the cases of packed parcels, for there the element was wanting that each parcel was separately addressed to the ultimate consignee. In charging according to the altered system, the plaintiffs are in fact treated in the same way as the rest of the public, as the case specifically

(1) 1 B. & S. 112, 154; 30 L. J. (Q. B.) 273, 291.
(2) 4 C. B. (N. S.) 63; 27 L. J. (C. P.) 137.

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finds. The element of inequality, therefore, which is the determining fact in these cases, being here wanting, the company are at liberty to exercise the power given thus by their act of fixing the rates of charge at their discretion; and the Court will (as said by Cockburn, C.J., in *Re Baxendale* v. *Great Western Railway Company* (1)) "give the company credit for acting on an enlightened view of their own interests as identified with those of the public." (2)

Bovill, Q.C., in reply.

Cur. adv. vult.

Jan. 31. The judgment of the Court (Pollock, C.B., Channell and Pigott, BB.), was delivered by

CHANNELL, B. This is an action by the plaintiffs, who are common carriers, against the London and South Western Railway Company, to recover back the amount of certain overcharges which, as they allege, the defendants have made, and which they have paid under protest. On the trial before my brother Martin a verdict was found for the plaintiffs, subject to a special case, which has been since stated, and which was in the course of this term argued before us. My brother Martin went to chambers before the arguments were concluded; and this is, therefore, only to be taken as the judgment of the Chief Baron, my brother Pigott, and myself; my brother Martin, however, concurs in our opinion.

It appears from the case, that the plaintiffs carried on the business of common carriers, and for that purpose used the defendants' line, which runs between London and Southampton. There are three special claims made by them for overcharges by the defendants in respect of this use, and we have to see whether in respect of any of these the plaintiffs are entitled to recover. The question turns on the company's special act, 4 & 5 Wm. 4, c. lxxxviii., ss. 149, 155, & 156, but especially on s. 158, commonly known as the *equality clause*, which provides that all "rates, tolls, and sums shall be so fixed, as that the same shall be taken from all persons alike, under the same or similar circumstances;" and it was argued on the part of the plaintiffs, that the case was in

(1) 5 C. B. (N. S.) 353; 28 L. J. (Q. B.) 83.

(2) MARTIN, B. left the Court during the course of *Wood's* argument.

effect governed by various decisions in this and other courts, on other Acts of Parliament drawn in the same, or nearly the same, words as those I have just read.

The case, having set out the important sections of the act, then states the grounds on which each head of claim is based, and I proceed to consider them in order.

As to the first head [the learned judge then read the first claim in the words set out above, and shortly reviewed the facts stated], the case is here brought within the range of the authorities cited by Mr. Bovill, and we are clearly of opinion that on this head the plaintiffs are entitled to recover.

As to the second head, Mr. Wood very properly admitted that he could not support the course pursued by the company, and therefore on this head also we hold the plaintiffs entitled to recover.

As regards the third head, it appears that the defendants collected parcels in London, and sent them by their line to Southampton, and thence, by means of a tramway and steamers, they landed them at the Newport wharf. For this they charged a through fare to Newport. They also carried goods for the plaintiffs from London to Southampton, which the plaintiffs themselves received at Southampton station, and delivered to their consignees at Southampton, and also at the Isle of Wight. It is said that the cost incurred by the defendants in carrying goods from Southampton to Newport by tramway and steamers, is less than that necessarily incurred by the plaintiffs in carrying goods to their customers in the same place; and the plaintiffs accordingly call on us to enter into the question of what is the proper deduction to be made from the defendants' charge for carriage to Newport, when they are employed only to carry to Southampton. Now, the defendants are clearly entitled to do what they profess to do, viz., to carry on the business of common carriers from London to Newport, using their line for that purpose so far as it is available, that is, from London to Southampton, and acting as common carriers off their line, beyond Southampton terminus. Several cases were pressed on us to shew, that when railway companies collect goods in London or its neighbourhood, and at the other end deliver them, free of charge, to their ordinary customers, an inequality is caused

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if carriers, having the duty of collection and delivery, are charged at the same rate. We abide by those decisions; but with respect to their application to the present case we say, that the collection and delivery was there auxiliary and subsidiary to the business of the companies, not as common carriers, but as carriers by railway. When, however, they claim to avail themselves of the tramway and steamers referred to in the case, to enable them to deliver at Newport, this is not auxiliary and subsidiary to their business as carriers on their line, but to their position as common carriers from London to Newport, availing themselves of their line so far as it serves their purpose. We must look at the case on the facts as they are stated, and we find there no suggestion of fraud or *mala fides*; the only question is, whether we can see on the facts stated any necessary inequality, and we answer that we cannot. Therefore on this point there must be judgment for the defendants.

Judgment on the first and second points for the plaintiffs; on the third point for the defendants.

Attorneys for plaintiffs: *Uptons, Johnson, & Upton.*
Attorney for defendants: *Lewis Crombie.*

Jan. 29.

CRAGG *v.* TAYLOR.

Charging order under 1 & 2 *Vict. c.* 110, *s.* 14—*Trust in Shares in a Company limited under* 25 & 26 *Vict. c.* 89.

The plaintiff having obtained a charging order under 1 & 2 Vict. c. 110, s. 14, on shares standing in the name of the defendant in a company, limited, the Court refused an application to rescind the order made by the defendant on the ground that the shares were held by him in trust for a third person.

THE plaintiff in this action, having recovered judgment against the defendant for 198*l.*, had obtained an order, which Martin, B., had made absolute, under 1 & 2 Vict. c. 110, s. 14, charging with that sum fifty shares standing in the name of the defendant in the Glynrhonwy Slate Company, Limited. A rule *nisi* to rescind this order had been granted on affidavits shewing that the shares charged were owned by the defendant's brother, the Rev. V. P. Taylor, and had formerly stood in his name; but that the defen-

dant, who was a director in the company, having parted with all his shares in it, his brother, in order to qualify him for acting as a director, had, in July, 1865, transferred the shares in question into his name, to be held by the defendant as trustee for him.

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M'Intyre shewed cause. This order raises the question put by Martin, B., in *Fuller* v. *Earle* (1), where he says, in confirming the order, "If the defendant were a trustee merely, and had been so originally, a doubtful question might arise." But the decision here ought to be the same; for it is beyond the functions of the Court to inquire into anything beyond the legal rights of the parties, and this (viz., *legal* right) is the interpretation to be given to the word *right* in the statute, "standing . . . in his name *in his own right*." The case already cited, and that of *Baker* v. *Tynte* (2), shew that the Court will not take upon itself to decide whether the defendant has such an interest as he could charge in equity, if he appear to be the legal owner; but if he has not such an interest, no one will be injured by the order, for the order has only such an effect as the debtor's own charge would have had, and entitles the creditor to the same remedies; these remedies, whatever they may be, the plaintiff is entitled to obtain. But the present case is especially strong from the fact that by the Companies Act, 1862, (25 & 26 Vict. c. 89), under which these shares exist, it is provided (s. 30) that no notice of any trust shall be entered on the register of members required to be kept by the company (s. 25), and that the register shall be *primâ facie* evidence of all matters directed by the act to be inserted in it (s. 37). It appears, therefore, to have been the intention of the legislature not to allow any trust to exist in shares of this nature valid against third persons.

[PIGOTT, B., referred to section 43, providing for the entry of mortgages on the register.]

Cole, in support of the rule. It could not have been the intention of the legislature to charge stocks standing in the names of trustees. It is a matter of every day's occurrence that the funds of a marriage settlement are invested in stocks, and even in shares

(1) 7 Exch. 796; 21 L. J. (Ex.) 314.

(2) 2 E. & E. 897; 29 L. J. (Q. B.) 233.

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of companies under the act. If the opposite intention is admitted, all such funds may be charged, and the *cestui que trusts* will be driven to the expensive remedy of proceedings in Chancery. In *Baker* v. *Tynte* (1) the judgment debtor was *cestui que trust* of the fund, and the order was made under different words in the section, and in *Fuller* v. *Earle* (2) it was evidently a doubtful question, but here the trust is clear and uncontradicted.

POLLOCK, C.B. This rule must be discharged, and the order must stand. My brother Martin has referred me to a case of *Rogers* v. *Holloway* (3), in which the Court of Common Pleas, in a case very like to, though not precisely the same as this, refused a similar application. Tindal, C.J., there said (p. 299), "If we entered into the matter, it appears to me we should have to settle a complicated question of equity; and that we cannot do." On this principle I think we ought to refuse the application here.

Another strong reason for holding this is, that the act under which the shares exist requires the registration of all shareholders, and provides that mortgages shall be entered on the register (s. 43), but expressly says that no notice shall be taken of trusts (s. 30). From this we may infer that the intention of the legislature was, that third parties, at least, should not be called upon or entitled to go into the question of whether the shares are held by the apparent owner in trust for some one else. Whether, although in an ordinary partnership one man cannot be a partner in trust for another, yet a court of equity would hold that in this novel kind of partnership created by statute such a thing may be done, I do not say, but whatever the equitable rights of the parties may be, we cannot in this court take them into consideration.

MARTIN, B. I am of the same opinion. I am now satisfied that my original view was wrong, and that this order, which was made after great consideration, was rightly made. The object of the legislature plainly was that all the shareholders should appear upon the register; that is, that the register should express who are the partners in the concern; every part of the act is strong to shew this, but especially the sections referred to by my lord, and

(1) 2 E. & E. 897; 29 L. J. (Q. B.) 233.
(2) 7 Exch. 796; 21 L. J. (Ex.) 314.
(3) 5 Man. & G. 292.

my brother Pigott. The 30th section directs that no trust shall be entered on the register; that is, in substance, that no notice shall be taken of any trust by the managing body. The real owner here being unwilling to exercise his right of choice in managing the affairs of the company, has transferred his shares into the name of the defendant, to enable the defendant to exercise those functions in his behalf; but he himself claims to retain the beneficial interest. If a court of equity would, in fact, permit one person thus to screen himself from liability (should the affairs of the company be adverse), behind a nominal owner, who may from poverty or any other reason, be unable to meet the demands made upon him as a shareholder, and then to step in (should its affairs be prosperous) and take the profits, no injury is done to his rights by this order, for the order must be enforced in equity. The courts at Westminster are, by the statute, to make the order on shares in any public company standing in the name of the defendant in his own right; the meaning of this I take to be, not held by him as executor, which would satisfy all the words of the statute. The statute then goes on to say that, "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Therefore, all that the order does is, to give the plaintiff the liberty of investigating the facts; and he is entitled to have the benefit of being placed in a position to raise this question, which otherwise he could not raise at all. If he would have had any rights under such a charge made by the debtor, the order puts him in possession of these rights; if he would not, the order does not confer them upon him. I think we ought to follow the case in the Common Pleas referred to.

CHANNELL, B. I am of the same opinion. On some points which were argued before us I give no opinion; but the ground on which I proceed is this. These shares are standing in the name of the defendant in a public company; there is, therefore, *primâ facie* a clear power in a judge of a common law court to make a charging order upon them. This power is sought to be impeached; and on looking at the real state of facts, we see that the defendant was made transferree of the shares only for the purpose of protecting his brother's interest in them. Whether a court of

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equity would, or would not, consider the defendant a trustee for his brother, and hold that he had committed a breach of trust in allowing judgment to go against him so as to charge these shares, it is clear that a court of law cannot interfere in the matter. It must be recollected that by the statute no proceeding can be taken to have the benefit of the order until the expiration of six months from its date; there will, therefore, be abundant time for any person who claims an equitable interest in these shares to establish his rights. Our decision agrees with the principle adopted in the case mentioned by my lord, and I think that principle is right.

PIGOTT, B. I agree with the rest of the Court. I give no opinion on the question whether the relation of trustee and *cestui que trust* may be created in these shares; that is a question more fit for a court of equity. The principle stated by Tindal, C.J., in *Rogers* v. *Holloway* (1) applies to this case, and the authority of that case fortifies our decision. It is obvious that the facts shew a case of some doubt, and it would be a manifest injury to the plaintiff if he were precluded from raising the question before the proper tribunal.

Rule discharged.

Attorney for Plaintiff: *George Smith.*
Attorneys for Defendant: *Phelps & Bennett.*

Jan. 20.

DYER *v.* BEST.

*Penal Action—Common Informer—Limitation—*31 *Eliz. c.* 5, *s.* 5.

The 31 Eliz. c. 5, s. 5, applies to every class of actions on statutes imposing penalties, and a person suing for a penalty for himself alone, must therefore bring his action within a year after the offence is committed, in the same manner as though he sued as an informer *qui tam*.

Lookup v. *Frederick* (2), followed. *Chance* v. *Adams* (3), questioned.

DECLARATION that before and at the time of the committing by the defendant of the offences hereinafter mentioned, the defendant was one of the commissioners appointed by virtue of the Burton-

(1) 5 Man. & G. 292. (2) 4 Burr. 2018. (3) 1 Ld. Raym. 77.

upon-Trent Act, 1853, (16 & 17 Vict. c. cxviii.) for putting into execution that act, and acted as such commissioner: that after the defendant became and acted as such commissioner he became and was disqualified to act by reason of then being personally concerned and participating in a certain contract made between the aforesaid commissioners of the one part, and the defendant and another of the other part, for work to be done under the authority of the aforesaid act, and by the defendant participating in the profits of the said contract, and of the work done thereunder and under the authority of the said act; yet the defendant after the passing of the said act, and after he had in manner aforesaid become disqualified from acting as such commissioner, did [on fourteen specified occasions, ranging from the 5th of February, 1862, to the 24th of June, 1865] act as such commissioner as aforesaid contrary to the form of the said statute, whereby the defendant forfeited and became liable to pay to the plaintiff who sues the defendant for the same in this action, under the said statute, the sum of 50*l.* for each and every time he so acted.

Pleas, 1. Not guilty by statute 21 Jac. 1, c. 4, s. 4. 2. That the alleged causes of action did not accrue within one year before this suit. Issues thereon.

The cause was tried before Channell, B., at the Staffordshire Summer Assizes, 1865, when the jury found that four penalties in all had been incurred, and of these that one only had been incurred within a year of the commencement of the action. A verdict was accordingly entered for the plaintiff who was a common informer suing for himself alone, for 200*l.*, with leave to move to reduce the damages and enter a verdict for 50*l.* only, on the ground that the 31 Eliz., c. 5, s. 5, applied to common informers suing for themselves alone, as well as to informers *qui tam*.

The 31 Eliz., c. 5, s. 5, enacts that all actions which shall be brought for any forfeiture on any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs, or successors only, shall be brought within two years next after the offence committed, and that all actions which shall be brought for any forfeiture upon any penal statute, the benefit whereof is by the said statute limited to the queen, her heirs, &c., and to any other who shall prosecute in that behalf, shall be

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brought by any person that may lawfully pursue for the same within one year next the offence committed, and if any such action shall be brought after the time in that behalf limited, then the same shall be void.

The 10 & 11 Vict., c. 16, which is incorporated with the 16 & 17 Vict., c. cxviii, enacts (section 9) that "any person who at any time after his appointment or election as a commissioner shall accept or continue to hold any office or place of profit under the special act, or be concerned or participate in any manner in the profit thereof, or of any work to be done under the authority of such act, shall thenceforth cease to be a commissioner." And section 15 of the same act imposes on every person acting as a commissioner, being incapacitated or not duly qualified to act or after having become disqualified, a penalty of 50*l.*, recoverable by any person in any of the superior courts.

By 21 Jac. 1, c. 4, s. 4, the defendant in any action on a penal statute may plead the general issue, and give in evidence thereunder such matter as would be a good defence if specially pleaded.

In Michaelmas Term last *Gray, Q.C.*, obtained a rule in pursuance of the leave reserved.

Huddleston, Q.C., and *Henry Matthews* shewed cause. The 31 Eliz., c. 5, s. 5, applies only to the queen and to informers suing for themselves and the queen. When an informer sues for himself alone, there is no period of limitation. His is a *casus omissus*, *Culliford* v. *Blandford.* (1) *Chance* v. *Adams* (2) decided the same point in error: *Rex* v. *Gall.* (3)

[POLLOCK, C.B. In many cases the courts have refused to allow actions for penalties after a year has elapsed. Can you cite no more modern authority for your position?]

There are very few instances in which an informer has sued alone. Most penal statutes give the penalty to the queen and the informer. The case of *Lookup* v. *Frederick* (4) is an authority which the defendant will rely on, but an examination of the record proves it to be no decision on this point.

(1) Carth. 232; Comb. 195; Show. 353; Holt, 522; 4 Mod. Rep. 129.
(2) 1 Ld. Raym., 77. (3) 3 Salk. 200. (4) 4 Burr. 2018.

[POLLOCK, C.B., referred to 7 Hen. 8, c. 3, whereby, after reciting that many penal statutes had been made, some of which gave the penalty to the king, some to the king and an informer, and some to the informer only, it is enacted that all actions on such statutes should be brought by the king within four years of the offence committed, and by a common informer, whether suing for the king and himself or for himself alone, within two years.]

That statute is repealed by 31 Eliz. c. 5.

[CHANNELL, B. Its repeal furnishes an argument that the substituted enactment, 31 Eliz. c. 5, was intended to be *in pari materiâ*, and of equal extent, and that it covers all sorts of penal actions.]

Gray, Q.C., and *A. S. Hill*, in support of the rule. The 31 Eliz. c. 5, s. 5, applies to every class of penal actions, and to common as well as *qui tam* informers. It would be an absurdity if, whilst the crown is limited to two years, the subject should be under no limitation. The policy of the law is not to favour informers' actions, and when 7 Hen. 8, c. 3 was repealed, the legislature never could have intended, whilst putting a further restriction on the crown by the substitution of two for four years, to leave a common informer at large.

[POLLOCK, C.B. The 7 Hen. 8, c. 3, limits all these actions in point of time. Then the 18 Eliz. c. 5, which also applies to all informers, provides for certainty of the date of issuing the writ in such actions by directing a note of the day, month and year of issue to be indorsed thereon. Then comes the statute under consideration, which, following the course of previous legislation, must rather have been intended to restrain than to enlarge an informer's powers.]

That construction is favoured by 21 Jac. c. 4, which assumes (s. 3) that a year is the universal period of limitation for these actions by a subject, and even the party grieved has only two years, 3 & 4 Wm. 4, c. 42, s. 3. As to the authorities cited, the report of *Culliford* v. *Blandford* in the Modern Reports (1) and in Holt (2) shews that the decision was really only whether the suing out of a *latitat* was a sufficient commencement of an action. In *Chance* v. *Adams* (3) the point now raised was discussed, but the report of what occurred in the Court of Error is not satisfactory.

(1) 4 Mod. 129. (2) Holt 522. (3) 1 Ld. Raym. 77.

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[MARTIN, B. It is a significant circumstance that that case is not mentioned in *Wms'. Saunders* ii. 63, n. 6.]

It is a case of no authority, but *Lookup* v. *Frederick* (1) is directly in point. This very question there came before the Court of Common Pleas on a special case, and they held that the period of limitation did apply. To the same effect are the text-writers' statements in *Tidd's Practice*, 9th ed, p. 14; and *Buller's Nisi Prius*, 7th ed. p. 195. The better opinion, according to the former, is that 31 Eliz. c. 5, applies to *all* penal actions. See also Com. Dig. Tit. Information (A. 3).

POLLOCK, C.B. With regard to the question raised in this case under the statute of Elizabeth, it appears to me that no one knowing the history of our law, would suppose that any other period than one year from the act complained of, was the period during which a common informer may bring an action for a penalty. The point is supposed to turn upon the 31 Eliz. c. 5, and perhaps, strictly speaking, it does so. In order to come to a conclusion in favour of the plaintiff, we must consider that the legislature, which by the 7. Hen. 8, c. 3, had strictly limited every informer of every kind to one year, and which by the 18 Eliz. c. 5, had taken care to provide that the date of the issue of the writ, should be indorsed upon the writ itself—both statutes, be it observed, being to repress actions by informers,—made in the 31 Eliz. c. 5, the blunder of binding the queen to two years instead of four, and of limiting a *qui tam* informer, suing as well for the queen as for himself to one year, at the same time, by the repeal of 7 Hen. 8, c. 3, setting free an informer suing *pro seipso* from any limitation whatsoever. That is the conclusion we are asked to draw. But I am of opinion that the statute may be read otherwise, and that the latter part of the section was clearly intended to include every class of penal actions, whether brought by the queen, by an informer for the queen and himself, or by an informer for himself alone. The contrary conclusion would, it seems to me, be very absurd and one which we could not come to, especially when we remember in addition what for many years has been the understanding in the profession respecting these actions.

(1) 4 Burr. 2018.

As to the authorities on the subject, those in favour of the contrary view to that which I take are very questionable. Indeed in my judgment, if we look to the authorities, especially recollecting Mr. Gray's argument as to the case of *Lookup* v. *Frederick* (1), referred to in *Buller's Nisi Prius*, where, on the argument of a special case, the Court of Common Pleas decided this very question, we should be bound to construe the statute in the manner I have mentioned. The actual decisions then are in favour of this construction; and further, we have the statements in *Tidd*, *Buller*, and in *Williams' Saunders*, and greater authorities cannot be cited than these, also in favour of the same view. The older reports, I should notice, seem to omit all mention of the 7 Hen. 8, c. 3, and it was not alluded to before us in the argument on the part of the plaintiff. It appears to me to reconcile the whole course of legislation on the subject, and satisfies me that we should do injustice to the defendant, and I may add to the intentions of parliament, if we did not uphold the legal custom as to the period of limitation in these actions by informers. I am therefore of opinion that the 31 Eliz. c. 5. applies to a common informer suing either on his own account only, or for the queen also. He must therefore bring his action within twelve months, and in this case accordingly one penalty only is recoverable.

MARTIN, B. I am of the same opinion. It is notorious that these actions by informers existed to an enormous extent in the time of Henry VII., and it was considered expedient to check them. There were three classes of actions, viz., proceedings directly by the crown, by the crown and another, and by a common informer suing for himself alone. Mr. Matthews in his argument, stated that he did not know of any statute prior to 31 Eliz. c. 5. giving a penalty to the common informer suing for himself alone. The 7 Hen. 8, c. 3, however, shews that such actions then existed, because it provides for them, and limits the time within which they may be brought. Then by 31 Eliz. c. 5, an act passed when monopolies had become unpopular, a further step was taken to discourage actions by informers; and I think the act comprises all the actions which the 7 Hen. 8, c. 3, comprised. Being passed with regard to the same subject-matter it would surely be monstrous to exclude

(1) 4 Burr. 2018.

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one class of these actions, and leave them to be brought with no limitation whatever. The point, moreover, was decided by the Court of Common Pleas in *Lookup* v. *Frederick* (1); and in *Buller's Nisi Prius*, and *Tidd's Practice*, it is stated to have been so decided, and also that a contrary opinion had been entertained in *Culliford* v. *Blandford* (2); but that that opinion was unreasonable. I therefore am of opinion that the period of limitation prescribed by the statute of Elizabeth applies to this action.

PIGOTT, B. I am of the same opinion. On the question of the limitation of time, I agree with the Lord Chief Baron, and that view is supported by section 3 of 21 Jac. 1, c. 4, which enacts that an informer bringing an action for a penalty must make an affidavit that the offence was committed within a year of action brought; and the legislature therefore appear to assume that the statute of Elizabeth applies to all sorts of actions. That being so, I think that the verdict ought not to stand for more than one penalty.

CHANNELL, B., concurred.

Jan. 20. POLLOCK, C.B. I wish to add a few words to our judgment delivered yesterday in the case of *Dyer* v. *Best*. I find there is a case in the Irish Exchequer in which the Court expressed a strong opinion that the 31 Eliz. c. 5 was applicable to all classes of penal actions. The point itself was not directly decided there, but afterwards the Court acted on the opinion then expressed upon an occasion where a common informer sued alone, and held that he must bring his action within the year. The case to which I refer is *Barrett* v. *Johnson*. (3) All the cases cited before us were reviewed in the argument, and the statute 7 Hen. 8, c. 3, was referred to with numerous other statutes. In England there is no similar decision, probably because the point has hitherto been considered so well settled that it has not been thought worth while to raise it.

Rule absolute. (4)

Attorney for plaintiff: *Eaden*.

Attorneys for defendant: *Braikenridge & Sons*.

(1) 4 Burr. 2018.

(2) 4 Mod. 129.

(3) 2 Jones (Ir. Ex.) 197.

(4) The 10 & 11 Vict. c. 16, s. 17, provides that one-third of the commissioners shall go out of office every three years. That being so, in addition to the rule to reduce the damages, a rule *nisi* for a new trial was obtained on the ground of misdirection in this, that the

[IN THE EXCHEQUER CHAMBER]

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Feb. 7.

Landlord and Tenant—Tenancy continued by Remainder-man—Implied Term.

Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise, is a question of fact.

If such a tenant continues to hold under the remainder-man, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, nor is according to the custom of the country.

THIS action was brought by the plaintiff, as administratrix of H. Oakley. In the first count of the declaration, the plaintiff sued the defendant for not paying or allowing to the plaintiff for fruit-trees and shrubs growing on certain premises demised by the defendant to H. Oakley, according to the terms of the demise; and in the second count, for not appointing a person to value the fruit-trees and shrubs according to the same terms. The defendant denied the demise upon the terms alleged, and the issue joined on this plea was tried before Crompton, J., at the Cambridge Spring Assizes, 1864. A verdict was found for the plaintiff, subject to a special case, which stated as follows:—

In 1826, William Stephens the younger was, under the will of Richard Stephens, tenant for life of the premises in question, with remainder (after certain remainders which failed) to the defendant as tenant for life, with remainders over. The will empowered every

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learned judge had not told the jury with sufficient distinctness, that no evidence having been offered on either side as to whether the defendant had, or had not, been re-elected, they could only find a verdict for penalties incurred within the three years immediately succeeding the act of disqualification fixed on. On this point, the Court made the rule absolute for a new trial, Pollock, C.B., stating, that without entering at length into the question, he was of opinion that the plaintiff had not proved his case clearly enough to entitle him to a verdict. There was also a motion in arrest of judgment, on the ground that the declaration contained no specific allegation that the acts complained of were done within the county of Stafford. The venue was stated as usual in the margin, but it was contended that that was not sufficient. On the argument of the rule, however, this objection was abandoned.

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tenant for life in possession of the premises to lease them for any term not exceeding twenty-one years. In the year above-mentioned, William Stephens the younger and William Stephens the elder (who had no interest in the premises, and who died in 1829) leased the premises by indenture to H. Oakley for a term of twenty-one years, from Michaelmas, 1826, at the yearly rent of 14*l.* 14*s.* By the lease it was provided "that the lessors, their heirs or assigns, or their or his incoming tenant, shall and will at the expiration or other sooner determination of the said term of twenty-one years, pay and allow the said Henry Oakley, his executors, or administrators, for all fruit-trees and shrubs then growing and being in or upon the demised premises, which shall have been planted by the said Henry Oakley, his executors or administrators, at a fair valuation to be made by two indifferent persons, one to be chosen by each party, and in case of their disagreement, by a third person to be chosen by them jointly, whose decision shall be conclusive and binding upon each of the said parties."

The plaintiff is a nurseryman, and the demised premises were intended to be, and always have been, used by the plaintiff as a nursery-ground.

Upon the expiration of the lease, at Michaelmas, 1847, H. Oakley applied to Stephens for a fresh lease on the same terms as before; but Stephens said, "There is no occasion for another lease, you can go on from year to year:" nothing further was said about terms.

The rent had, during the lease, been abated to 11*l.*, and that rent continued to be paid after its expiration, except that from Michaelmas, 1847, to Michaelmas, 1850, an additional rent of 2*l.* was paid for a piece of land which, during that time, was held with the other demised premises.

Stephens died in April, 1856, and the defendant became tenant for life in possession. Nothing passed between H. Oakley and the defendant as to the terms on which the occupation was to continue, but he paid rent to the defendant at the rate of 11*l.* a year, ending at Michaelmas.

H. Oakley died intestate in the year 1859, and the plaintiff took out letters of administration to his estate and effects. Nothing

passed between the plaintiff and defendant as to the terms of occupation, but the plaintiff paid rent to the defendant at the rate of 11*l.* a year, ending at Michaelmas.

In March, 1862, the defendant gave the plaintiff notice to quit at the ensuing Michaelmas, but as she did not require the premises till the spring of 1863, the plaintiff was allowed to remain in possession during the winter.

In February, 1863, the plaintiff called the attention of the defendant's son to the clause of the lease set out above, but until that time neither the defendant nor her son were aware of its existence.

On the 24th of February, 1863, the plaintiff gave to the defendant a notice, which recited the lease and the above-mentioned tenancies, alleging the tenancies to have been upon the same terms and conditions as were contained in the lease; stated that the effects on the premises were subject to a bill of sale; claimed compensation under the covenant for the fruit-trees and shrubs on the premises; gave notice that the plaintiff had, pursuant to the covenant, and with the concurrence of the holder of the bill of sale, appointed a person therein named as the valuer on her behalf, to make the valuation of the effects then being on the premises under the covenant; and required the defendant to appoint some person to be the valuer on her behalf, in accordance with the terms of the covenant.

The defendant not complying with this notice, the plaintiff appointed two persons, who valued the stock submitted to their notice, and the whole of which had been planted by H. Oakley, or by the plaintiff, during their respective occupations.

In August, 1863, the plaintiff was ejected by the defendant, and in October the stock on the premises was sold by auction by the defendant's direction, and the net amount realized was afterwards, at her request, paid over to the defendant by the auctioneer.

A copy of the lease was to form part of the special case, and the Court was to be at liberty to draw any inferences of fact, or to find any facts which, in their opinion, a jury ought to have drawn or found.

The question for the opinion of the Court was, whether, among the terms of the tenancy determined by the notice to quit, was

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engrafted the covenant in the lease of 1826, or a term to the same effect, obliging the defendant to take the stock on the premises at a valuation.

If the Court should be of opinion that such a term did attach to the tenancy between the plaintiff and the defendant, the verdict was to be affirmed, and the Court was to say on what principle the damages should be assessed; the amount to be settled out of court. If not, the verdict was to be entered for the defendant.

The special case was argued in the Court of Exchequer in Easter Term, 1865, and the Court gave judgment for the defendant. (1) The plaintiff appealed.

O'Malley, Q.C. (*Markby* with him), for the appellant. The question is, whether the plaintiff, who but for this covenant would have been entitled to remove the fruit-trees and shrubs as her stock in trade, *Wardell* v. *Usher* (2), is not entitled to have the benefit of the covenant also. The receipt of rent by the lessor from a tenant whose lease has expired continues the tenancy as a tenancy from year to year, on all such terms contained in the old lease as are not inconsistent with a yearly tenancy; and here, in addition to the circumstance of the payment of rent, it is stated that the original lessor in effect told the tenant that he might go on as before. H. Oakley would therefore have clearly been entitled to claim the benefit of the covenant as against Stephens. The same rule applies where a tenancy is determined by the expiration of the estate of the landlord, and the remainder-man continues to receive the old rent upon the old days. Here, also, the terms of the former tenancy are adopted, and the new landlord is to be considered as relying upon the prudence of his predecessor. The question of whether these terms are adopted or not does not depend upon the knowledge or ignorance of the landlord, but upon the fact that he chooses, by receiving the rent, to affirm the tenancy with all its incidents, so far as those incidents are, or may be, applicable to a yearly tenancy.

[BLACKBURN, J. I do not recollect any such case where the knowledge of the remainder-man is not expressed, or might not have been assumed.]

(1) 3 H. & C. 706; 34 L. J. (Ex.) 137. (2) 3 Scott (N. R.) 508.

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None of the cases on the subject proceed on that ground.

[WILLES, J. It is not even stated as a fact, that the defendant knew that the tenancy which she found in existence was one supervening on an expired lease.]

To make knowledge the determining fact would reduce us to this absurdity, that the tenant, who knew of the existence of the term, would hold on one contract, and the landlord, who was ignorant of it, would demise on another, which would in fact be no contract at all: *Hyatt* v. *Griffiths* (1); *Roe* v. *Ward* (2); *Doe* v. *Watts*. (3)

[MONTAGUE SMITH, J., referred to *Doe* v. *Prideaux*. (4)]

Keane, Q.C. (*D. Brown* with him), for the respondent, were not called on.

WILLES, J. We are all of opinion that the judgment of the Court below must be affirmed. It is impossible to read the case, without feeling that there may be a hardship inflicted on the plaintiff, and that property which she might have removed under the ordinary rule as to trade fixtures, may have been converted into money, which the defendant retains, in consequence of her not having taken that course at the proper time. If this should really be the case, it would be matter for the equitable consideration of the defendant; but it concerns her own good sense and feeling alone, we have only to decide the legal question. That question is, whether the defendant has so conducted herself as to be bound to fulfil the covenant contained in the original lease, or a corresponding contract made by her through her receipt of rent from the plaintiff.

The covenant in the lease was to the effect, that all fruit-trees and shrubs planted by the tenant during his term and remaining on the premises at its expiration, should be taken by the landlord at a valuation. The landlord was tenant for life, under limitations in which his estate preceded that of the defendant, who is also tenant for life of the premises. The term having expired, the tenant did not take advantage of his right under the covenant, but, having applied for a new lease, and been refused, he went on

(1) 17 Q. B. 505, 509.
(2) 1 H. Bl. 97.
(3) 7 T. R. 83.
(4) 10 East. 158.

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holding as tenant at the same yearly rent, and (on what then passed between him and the landlord) upon all such terms contained in the original lease as were not inconsistent with that tenancy. And it is probable (though it is not now necessary to decide the point) that these terms included the right to have the fruit-trees taken at a valuation.

The landlord died, leaving the original tenant in possession, who had thus either the right to call on the executors of the original landlord to take to the trees at a valuation, according to the covenant (his tenancy having now come to an end by the expiration of his landlord's title) if, as I incline to think, that term was not inconsistent with his yearly tenancy; or, if he had not that right, he had then the ordinary right of a tenant holding an uncertain interest, to remove within a reasonable time such fixtures as in the trade of a nurseryman are in the nature of trade fixtures. He did not take either course, but remained in possession, paying rent to the defendant, who succeeded as tenant for life; and, except that payment, there is nothing in the case to prove that the defendant took on herself the burden of the covenant in the lease, or of a contract similar to that covenant. The new tenancy thus constituted, though popularly spoken of as a continuing tenancy, was in fact a new contract and a new demise; and, while there is nothing except the payment of rent to shew that it was part of the terms of that contract that the trees should be taken at a valuation, there is, on the other hand, the strong improbability, pointed out by my brother Bramwell in the court below, that the tenant for life coming in should have entered into such a contract. There is no such argument against inferring the incorporation of the term in the yearly tenancy held under the former tenant for life, because what passed between them on its commencement may be considered to express or imply that this provision of the lease should continue. But no such explanations occurred on the letting by the second landlord; on the contrary, it is expressly found in the case that nothing passed between the tenant and the defendant as to the terms on which the occupation was to continue, and that both the defendant and her son were ignorant of the existence of the clause of the lease in question. Therefore we have an absence of knowledge on the part of the defendant of this term in the lease,

and also an absence of knowledge on the part of the defendant's agent (for her son seems to have acted in that capacity), and an absence of any duty on him or on her to have that knowledge; and of any circumstances making it probable that he or she would know it in fact. I assume, therefore, that at the time of the letting there was no knowledge, not only of the existence of the covenant, but that the tenancy, which was in popular language continued by the consent of the defendant, was a tenancy subject to any such special contract supervening on a lease containing such a covenant. Then what was the contract that the defendant agreed to with the original tenant? That he should continue to hold, paying the same rent on the same days; this there was no need to alter. But on what terms? The answer is simple; on such terms as were mentioned between the original tenant and the defendant, and if no terms were mentioned, then subject to the usual and ordinary terms of the place where the land was situated, or, in other words, according to the custom of the country. But we are asked to superadd another special term. Why? Only because it was one of the terms of the previous tenancy. That is no answer in law, because the contract was not the same contract. Then, is there any evidence of an assumption by the parties that the previous contract had contained this term and a new letting on that assumption? The answer is obvious, and the rule simple; those terms are to be assumed as existing which are according to use and custom, but not a special term in the original lease, not known to the defendant, and which she was not bound to know. The improbability of her assenting to such a term is not a conclusive circumstance, but it is satisfactory to reflect that in holding thus we are acting in accordance with the common sense of the case.

Mr. O'Malley has stated a difficulty on which, as he deems it such, I think it due to him to say a few words. His chief argument, and indeed the sum of all that he suggested, was that unless we held the landlord bound by this special term, the tenant would hold on one contract, and the landlord on another, which is a solecism. There can be no contract unless the parties are agreed on its terms. I will first put another case, in which, if we held in accordance with his argument, at least as great a solecism would result; and I will then shew that there is really

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no difficulty at all in what he suggests. I will assume that the landlord had survived Oakley, and that the representatives of Oakley had continued to hold under him, the lease being given up to the landlord or not having come to the knowledge of the executors; that the first tenant for life had then died during the present tenancy, the next tenant for life succeeding. Here is a case where neither the tenant nor the landlord, who were about to make a new contract of tenancy, was aware of the term; and if we must set solecism against solecism, it would be a greater absurdity to hold the one bound by, and the other able to take the benefit of, a term neither usual nor known to either party, than to treat the contract as void altogether. But there is really no such difficulty, for the case would only raise a question of fact easily solved. See what the effect would be if the difficulty were real. A tenant enters into a stipulation with the landlord's agent that the landlord shall repair a certain fence; he enters and pays rent; the fence becomes out of repair, and the tenant claims to have it repaired; the agent insists that there was no such stipulation, and a jury think that there was an honest mistake on both sides. Is the one not bound, if there was such a stipulation, and the other not bound if there was not? Is all the contract to be void, or rather, since the principal object of the contract was the letting of the land, does the demise exist on the terms which were mutually agreed on, and the mistake not have the effect of preventing the estate from passing? The difficulty is less in practice than that which occurred where a lease was made by indenture, and, the instrument being afterwards put into the fire, it was held that the rent was not destroyed, the tenancy existing by tenure, independently of the contract in the lease. The case is, I think, clear, as decided by the Court of Exchequer, and the admirable judgment delivered there by my brother Bramwell is conclusive.

BLACKBURN, J. I am of the same opinion. The plaintiff, who is the representative of the original tenant, had been in the practice of paying a certain rent to the predecessor of the defendant, and the defendant, knowing the fact, accepted the same rent from him. No doubt by this acceptance the plaintiff became tenant from year to year to the defendant, but the question is, whether

by this act any other terms were agreed upon. If both parties knew that there were certain special terms included in the former tenancy, it would be reasonable evidence, but still only evidence from which a jury, or we acting as a jury, might draw the inference of an intention on both sides that the plaintiff should hold on those special terms. But when it is once established that it is a matter of evidence, it is utterly impossible to incorporate a term not known to the defendant, though, if known and applicable, it might be supposed to be incorporated. No doubt such a case might happen as that suggested by Mr. O'Malley, of the landlord saying to the tenant, "You were tenant under a sensible and prudent man of business, and you shall continue to hold under me upon the same terms;" but in the absence of such agreement, and none such appears here, such a holding cannot be assumed unless the terms were known to both parties.

Applying these principles to the present case, there had here been originally a lease. That lease contained a clause binding the landlord to pay for all fruit trees and shrubs remaining on the land at its expiration. A person who holds a nursery ground as tenant, has a right at the expiration of his tenancy, to remove fruit trees and shrubs planted by him, and which then in fact form part of his stock in trade; but this does not entitle him to cut down or remove plants which would only be destroyed by such a process, and would after it be of no use to him for the purpose of his trade; such mere waste as this is not allowed to him by the rule. I do not understand that Oakley, by the stipulation in question, deprived himself of that right, and I mention this because the supposed hardship of the case was based on the opposite construction. I take it that the stipulation was intended merely as an inducement to him to stock the ground well. However this may be, there is evidence on which a jury might find, that Oakley and Stephens did, at the expiration of the lease, agree that the date of the valuation should be postponed to the end of the new tenancy. But Stephens having died, and the defendant coming in in ignorance of any such stipulation, it is impossible to hold that she agreed to that term, nor is it probable that if she had known of it she would have so agreed. The term not being a known term, nor one according to the custom of the country, there is no

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evidence of its a loption, and if we must draw an inference from the facts stated, whether she a lopted it, my conclusion would be in the negative.

KEATING J. I also think the judgment ought to be affirmed, on the simple ground that the case finds, as a fact, that the defendant was ignorant of the term.

MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *J. & C. Cole.*
Attorneys for the defendant: *Abbott & Jenkins.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 8.

CARR *v.* LAMBERT AND OTHERS.

Common—Cattle, levant and couchant—Extinguishment—Change in condition of Dominant Tenement.

A right of common appurtenant for cattle *levant* and *couchant*, proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now, and for more than thirty years past, turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle.

THIS was an action of trespass.

The first count was for breaking and entering the plaintiff's land, and pulling up and destroying the plaintiff's posts and rails thereon.

The second count was for injuring the plaintiff's reversion in the same land, by pulling up and destroying posts and rails, being upon and parcel of the land.

Plea 5. That the defendant, John Woodall, at the times when the defendants did what is complained of, and thence to the commencement of this suit, was possessed of a toftstead, the occupiers whereof for 30 years next before this suit, enjoyed as of right and without intermission, common of pasture over the land in which, &c., in the first and second counts mentioned, for all their cattle

levant and couchant upon the said toftstead, at all times of the year, as to the said toftstead appertaining; and that the alleged trespasses and grievances were done by John Woodall, and by the other defendants at his command, for the purpose of removing obstructions to his enjoyment placed there by the plaintiff.

6. Repeating the allegations in the 5th plea, substituting the period of 60 years for the period of 30 years.

The cause was tried before Blackburn, J., at the York Summer Assizes, 1864, and a verdict was then entered for the plaintiff, on (amongst others) the issues on these pleas, with 40s. damages, leave being reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion, on the facts appearing in evidence at the trial as stated below, that there was evidence to support the right of common set up in these pleas.

It was proved that, at the time of the alleged trespasses, the defendant John Woodall was possessed of a toftstead, consisting of a cottage and stable, with a garden and orchard of the extent of about two acres. Evidence was given, that about 50 years before the commencement of the action, this had been planted with fruit trees, but that before that time it was swarth, and had been depastured with cattle. No direct evidence was given as to the number of cattle which it had then supported, or was capable of supporting, and no point was raised at the trial on either side as to the necessity of proof on this subject. After a great deal of evidence had been given, the learned Judge suggested that the fact seemed clear, that the owners of the toftstead had as of right turned the cattle housed on the toftstead, but not deriving their sustenance therefrom, on the *locus in quo* for more than 30 years; and that the only question was one of law, viz., whether such a right of common was legal, or in other words, if such cattle were levant and couchant. Both sides assented to this suggestion, and no other question was required to be, or was, in fact, left to the jury; and thereupon the learned Judge directed a verdict to be entered for the plaintiff, and reserved leave to move to enter a verdict for the defendants as above stated.

A rule was afterwards obtained accordingly, and made absolute

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in the court of Exchequer (1); and from this decision the plaintiff appealed.

Hayes, Serj. (*Kemplay* with him), for the plaintiff. There is no trace of this precise question having been raised before; levancy and couchancy has been generally referred to only as a measure of the potentiality of the land to support the cattle for which common is claimed, and it is on this view that the judgment of the court below proceeds. It is referred to in this way by Parke, B. in *Whitelock* v. *Hutchinson* (2), who lays down that the land must be such as that its winter eatage and its summer crops will, together with the common, be sufficient to maintain the cattle, and this ruling has been treated as an authority for the other side. But the present point is not raised there, nor are the learned judge's words inconsistent with the plaintiff's view, and on principle and analogy the privilege ought to be confined to land which is in a condition to support cattle. The case is analogous, first to the old case of distress for rent, of cattle damage feasant, by one into whose land they have escaped by reason of a defect in fences which his tenant was bound to repair; it was laid down that he can distrain them if they have been levant and couchant on the land, *Poole* v. *Longueville* (3), which is taken as meaning that they have passed a night on the land, and the reason of it is that they must then have fed off it. Second, it is analogous to the case of common appendant, which is exercisable only in respect of arable land; and with respect to such a right of common it is laid down that it must be prescribed for as appendant to *land*, that is arable land, and for cattle levant and couchant; *Tyrringham's Case* (4), *Bennett* v. *Reeve* (5), *Rumsay* v. *Rawson.* (6) So also a right of turbary ceases if the house to which it is annexed is burnt down. With respect to common appurtenant itself, it is also laid down that it must be claimed for cattle levant and couchant (7); and although it can be prescribed for as appurtenant to a messuage

(1) 3 H. & C. 499; 34 L. J. (Ex.) 66.
(2) 2 Mood. & Rob. 205.
(3) 2 Wms'. Saund. 288.
(4) 4 Rep. 36 *b*.
(5) Willes. 227.
(6) 1 Vent. 18.
(7) 1 Wms'. Saund. 28, *d.* note (4), to *Earl of Manchester* v. *Vale*; *Mellor* v. *Spateman.* Ib. 346, *d.*

cum pertinentiis, this is because it will be intended that there was a curtilage on which the cattle might be fed. *Patrick* v. *Lowre* (1), *Com. Dig. Tit. Common.* (B.C.) In these decisions it was evidently assumed that the cattle were both housed on, and fed off, the dominant tenement, and there is nothing in the subsequent cases of *Whitelock* v. *Hutchinson* (2) and *Cheesman* v. *Hardham* (3) in opposition to the view. Although the land is there referred to rather as the measure of common than with any other view, probably because in those cases (as usually happens) there was no doubt about the cattle being actually fed off the land, the expressions of the judges fairly imply that this was their meaning, and the same condition is more clearly expressed by Buller, J. in *Scholes* v. *Hargreaves.* (4) If it were otherwise it would follow that if the dominant tenement were entirely built over, or turned into a reservoir, the right of common would still remain. Supposing, however, that it were admitted that the cattle need not be actually levant and couchant, in a literal sense, upon the land, and that they need not be actually fed off the produce of the land, yet it would be necessary that the land should be in a condition in which it *could* be fed off by them, for otherwise the land does not even serve as a measure of common. That measure can only be arrived at by seeing how many cattle the land actually does support, or supports *communibus annis*, or by seeing how many the land, in its then state, would support if cattle were turned on to it. If it would support none, then there are no commonable cattle, and whether the right is or is not extinguished it is at least suspended.

Field, Q.C. (*Perronet Thompson* with him), for the defendants. It is stated in the facts admitted, that the land was formerly in a condition to support cattle; if, therefore, it is necessary that, in the origin of the right, cattle should have been levant and couchant in the sense contended for on the other side, that condition is satisfied, and the question is only whether the right is lost or suspended, because the land does not now in fact support them. If it is necessary that the cattle should be levant and couchant on the land, in the strict

(1) 2 Brown, 101, see 1 Wms'. Saund. 346, *c.* note (2).
(2) 2 Mood. & Rob. 205. (3) 1 B. & A. 706. (4) 5 T. R. 46.

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and literal sense, that is also admitted; and to enable the plaintiff to succeed he must shew it to be necessary that they should be actually maintained off it. The defendants, on the contrary, maintain that the condition of levancy and couchancy is only to be taken as the measure of the capacity of the land to maintain the cattle, and the supposed analogies and the authorities cited on the other side on examination support this view, which agrees with the mode in which such questions are usually left to the jury. In 1 Wms'. Saund. 346 *d.* note (*l*), the phrase is referred to the cattle having their abode upon the land. The analogy of its use in respect to cattle damage feasant, distrained for rent, is in favour of this meaning, for it only signifies an actual presence of the cattle upon the land for one night. The actual presence of the cattle on the land, however, is not to be taken as a fulfilment of the condition of levancy and couchancy, but is itself the condition of the question arising, since otherwise they could not be distrained at all. Neither has the condition reference to the nourishment of the cattle; but is taken as a measure of duration, indicating their abode to be of some permanence, and perhaps as happening with the consent of the owner; and it thus answers to the notice which modern law requires to be given to the owner by the landlord whose tenant has made default in repairing the fences, and which has susperseded the condition formerly required of levancy and couchancy. See 2 Wms'. Saund. 290, note. (7) With respect to common appendant it is said, in *Tyrringham's Case* (1), that if a man prescribes for common appendant to a house, or meadow, or pasture, it is bad, because it appears, on his own showing, that there was always a house, and meadow, and pasture; that is, there is no inference from his statement that there ever was any arable land; but, on the other hand, it is said that, if part of his land is built upon, and part turned into pasture his right of common remains, though he must still prescribe for it as appendant to *land*. All that *Bennett* v. *Reeve* (2) and the other cases cited decide, is, that with respect both to common appendant and common appurtenant, it is necessary to aver that the cattle were levant and couchant; but they do not state the

(1) 4 Rep. 37 *b*. (2) Willes. 227.

phrase to mean that the cattle are actually supported off the land; and no number of cases stating the necessity of this condition will prove it to be necessary that the cattle should be actually fed off the land, unless it is first established that this is the meaning of the term, which is the very thing to be proved. It is laid down that common may be claimed in respect of a messuage (see cases cited in 1 Wms'. Saund. 346. *c.* note 2); but with reference to this, *Patrick* v. *Lowre* (1) is relied upon, as shewing that the messuage must have lands belonging to it on which the cattle are fed. This inference is, however, erroneous, for all that is said is, that it shall be intended the beasts are "nourished and fed *upon* the land;" not that they are fed *off* it; the meaning is only that they shall be housed there, as is shewn by the words "it shall be intended so many of the beasts, *which may be tied*, and are usually to be maintained and remaining within the house;" and this agrees with what Lord Kenyon says in *Scholes* v. *Hargreaves* (2), in denying the sufficiency of the dominant tenement, "it was expressly proved that no horse or bullock could possibly be kept there." If, therefore, levancy and couchancy refer to the locality of the cattle at all (which upon the later law may be doubted), they refer only to the housing of the cattle upon the land, not to the locality of the place from which their sustenance is derived; and on the authority of the cases cited it may be maintained that, if the land were entirely built over, or, as suggested on the other side, turned into a reservoir, the right of common would clearly remain if there were any possibility of housing the cattle there, and would probably remain even if that were impossible; and it would only be necessary to prove, as is done here, that the land was once in a condition to support so many cattle as have been turned on to the common. It was for want of the proof of this condition that *Scholes* v. *Hargreaves* (2) was decided against the right of common; Lord Kenyon saying, that "levancy and couchancy are a mode of admeasuring the common;" and that language is adopted by Bayley, J., in delivering the considered judgment of the Court in *Cheesman* v. *Hardham* (3), where he himself says more distinctly,

(1) 2 Brown. 101.
(2) 5 T. R. 48.
(3) 1 B. & A. 706.

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that "the fair meaning of the words cattle levant and couchant, is, the number of cattle which the land is *capable* of maintaining." This is stated as the result of *Rogers* v. *Benstead* (1), (see also *Fulcher* v. *Scales* (2)); and it agrees with the rule laid down by Parke, B., in *Whitelock* v. *Hutchinson*. (3) The land would not cease to be capable absolutely, because it was not at the present moment actually capable, *Cole* v. *Foxman* (4), and the measure would, if necessary, be obtained by resorting to evidence as to how many it in fact maintained formerly, or by a comparison with neighbouring land. But in the present instance, it is to be observed, that there is nothing in the actual condition of this land which makes it impossible, or even difficult, to turn it to the purpose of feeding cattle. The result is, that there is no authority for saying that, when a possible origin for the right of common is shewn, actual levancy and couchancy, in any sense, is necessary for its continuance; certainly not in the sense of the cattle being actually supported by it, which is the only sense which will assist the plaintiff. This agrees also with the reason of the thing; for the consequence of the opposite doctrine would be, that an improved system of tillage adopted by the commoner would deprive him of his rights. Common appurtenant differs from common appendant in this, that the latter is a right for certain specific purposes; if those purposes are no longer required, there might be some reason to say that the right would cease; but the former is a right of a general character, annexed to the dominant tenement, not for the greater enjoyment of that tenement in itself (as by ploughing or manuring it), but for the general profit of its owner, and as an additional grant. Again, it does not interfere with the enjoyment of the lord, or of the other commoners, that the cattle should be fed otherwise than off the produce of the dominant tenement, if the owner does not exceed his rights of common as measured by his land; and it is agreeable to the principles of law to limit acts of enjoyment, not with reference to the benefit derived by the claimant of the right, nor the mode in which he derives it, but with reference to the kind and degree of burthen imposed upon others by his acts. The kind and degree are here

(1) 1 Selw. N. P. (12th ed.) 484.
(2) Ib.
(3) 2 Mood. & Rob. 205.
(4) Noy. 30.

the same, whether the cattle are fed off the dominant tenement or not, and no definite principle or authority has been shewn to limit the operation of that rule.

Hayes, Serjt., in reply. *Cur. adv. vult.*

Feb. 8. The judgment of the court (Willes, Blackburn, Mellor, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. In this case, which was argued before us yesterday, and in which we postponed our judgment, we are of opinion that the judgment of the court of Exchequer is right, and ought to be affirmed. The main part of my brother Hayes' argument was this: he insisted that the character of the dominant tenement had been so altered from its character of pasture, by means of a building being placed upon it, and the rest turned into orchard ground, that thirty years' user of common by cattle housed upon, but not fed off, it, was not evidence of any right which could in point of law exist. His argument had considerable force with reference to a total change of character, but much less force can be allowed to it with reference to the facts of the present case. If he could on the facts have established the conclusion that the character of the dominant tenement was so altered that it could not be applied to the purpose of producing fruits on which to keep cattle,—if, for instance, a town of considerable extent had been built upon the land and its neighbourhood, or if it were turned into a reservoir, as was suggested in the argument, it might be a question whether the right of common were not extinguished or suspended. We do not express any opinion on that question, because on the facts stated it seems that the toftstead, which was the dominant tenement, consisted of a cottage and a stable, with a garden and orchard of two acres. It had, therefore, land in a state in which it might have been laid down for pasture, or for meadow, or cultivated so as to produce artificial plants and roots for the support of cattle. This is, therefore, not the case of a dominant tenement, so changed in character as that cattle might not be fed off its produce. If, then, my brother Hayes had succeeded in satisfying us that the expression of levancy and couchancy is not a mere measure of the capacity of the land to keep cattle out of artificial or natural produce grown within its limits, but that it is

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further necessary to shew that it could, in its actual state, produce such food, he would still not have succeeded in shewing facts negativing the capacity of the land to do this; for the evidence is quite consistent with the following state of facts—land in a state of cultivation suitable for the support of cattle, afterwards in part built upon, and the rest cultivated, not with a view to the support of cattle, but in a state in which it might easily be turned to that purpose. There is no authority, either in the class of cases relating to the abandonment or loss, or to the suspension of rights, by the destruction, absolute or temporary, of the necessary measure of enjoyment, which would justify us in holding that a right, once created and existing, was under these circumstances destroyed by the act of the proprietor. The acts of use which have been proved ought to be referred to a legal origin, if they are consistent with it, rather than treated as a series of trespasses; and their inconsistency with legal right is not to be assumed, unless they could not be attached to a legal origin, or the right to which they were attached has been since extinguished or suspended. Our judgment proceeds on this proposition, that facts appear which shew their referribility to a legal origin, and that it has not been shewn that the right was suspended or extinguished; and whoever has heard cases of this nature tried will think that the direction usually given on their trial is in accordance with our present decision. That direction refers to levancy and couchancy, rather as the measure of capacity of the land, than as a condition to be actually and literally complied with by the cattle lying down and getting up, or by their being fed off the land. The judgment of the court of Exchequer is therefore affirmed.

Judgment affirmed.

Attorneys for plaintiff: *J. W. & W. Flower.*
Attorneys for defendants: *Williamson, Hill, & Co.*

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Damages—Measure of, for breach of Contract—Remoteness.

The defendants having contracted with the plaintiff to receive his ship into their dock at a specified time, and having given him notice that they could then receive her, she was brought to the dock in ballast upon a stormy day, under the charge of her captain and a pilot. Owing to the breaking of one of the chains of the dock-gates, the defendants were unable to let her in. The captain, after consultation with the pilot as to the best course to be pursued, anchored the ship outside the gates. At the turn of the tide she grounded on a sandbank and broke her back. The plaintiff having brought an action against the defendants for the damage done to the ship, two questions were put to the jury upon the trial: first, was it possible to have taken the ship to a place of safety; and secondly, if so, was it the captain's or the pilot's fault that she was not taken there? On the first question the jury were unable to agree, and in reply to the second, found that neither the captain nor the pilot had been guilty of negligence. The judge thereupon directed a verdict for the plaintiff, with leave to enter it for the defendant, the Court to draw inferences of fact consistent with the finding of the jury:—

Held, by POLLOCK, C.B., CHANNELL and PIGOTT, BB., that the finding of the jury was not sufficient to enable the Court to draw any conclusion as to whether or not the loss was occasioned under circumstances rendering the defendants liable for the damage to the ship, as the consequence of their breach of contract, within the rule laid down in *Hadley* v. *Baxendale* (1), and that there must be a new trial.

Held, by MARTIN, B., that, on the facts and finding of the jury, the damage done to the ship might be fairly and reasonably considered as the consequence of the defendants' breach of contract.

DECLARATION, that the defendants were proprietors of a certain dock on the river Usk, which dock was used by them for the reception of and docking of ships, for reward to the defendants in that behalf; that the plaintiff was the owner of a ship, and was desirous of having the same received and docked by the defendants in their dock for reward to the defendants, whereof they had notice, and thereupon, in consideration that the plaintiff would cause the said ship to be brought at a certain time and on a certain day towards and to the dock, for the purpose of being received and docked therein, the defendants promised him so to receive and dock the ship; that the plaintiff, relying on the defendants' promise, did cause the ship to be brought at the time and on the day aforesaid towards, and the same was

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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being brought towards and to the dock, for the purpose of being so received and docked therein as aforesaid, and all things were done, &c., yet the defendants did not, nor would, receive and dock the ship of the plaintiff, and the ship being, by reason thereof, left in the river at the ebbing of the tide there grounded, and was thereby damaged and injured, and the plaintiff incurred great expenses in and about having such damage and injury repaired.

Plea. Payment of 15*l.* into court.

Replication damages ultra. Issue thereon.

The cause was tried before Byles, J., at the Monmouthshire summer assizes, 1865, when the following facts were proved:—On the 17th of November, 1863, the plaintiff's ship, *Lord Elgin*, was in dry dock at Newport, where she had been undergoing repairs. The plaintiff was desirous of removing her, the repairs being complete, to a wet dock, and accordingly applied to the defendants, who are dock proprietors, to know if they could receive her, and on the evening of the 17th they sent a notice to the captain that, on the following morning by the first tide, the ship might come down from the dry dock to the wet dock where they would receive her. Accordingly next morning the ship was towed down the river Usk, in charge of her captain and a river pilot, to a point opposite the defendants' dock-gates, but on her arrival the defendants stated that they could not admit her owing to a chain of one of the dock-gates being out of order. A discussion thereupon ensued between the captain, who was wholly unacquainted with the river, and the river pilot as to what course should be adopted. The *Lord Elgin* was in ballast, but the morning was stormy, and she was not in a condition, in the captain's opinion, to go further down the river into deep water. The pilot, however, thought he could prudently have taken her either to a place called West Point or into deep water. Some evidence was also given as to the possibility of her being taken back safely up the river to a place called Wilmot's Wharf, but her voyage thither would have been hazardous, owing to the number of small craft that happened to be in the river. Eventually, however, anchor was cast, and the ship remained where she was, outside the defendants' dock. When the tide turned she floated round, and in a few hours

grounded on a sandbank and was there "hogged," *i.e.*, broke her back. She sustained great damage, and the plaintiff now sought to recover the expenses he had been obliged to incur in repairing her. It was conceded that the amount paid into court was enough to cover the expense of bringing the ship to the dock-gates, but it was wholly inadequate to cover the expense of repairing the injuries done to the ship by grounding.

The learned judge left the following questions to the jury:—1st, Was there a place of safety to which, under existing circumstances, the vessel might have been taken? If so, was Wilmot's Wharf, or West Point, or below (the deep water), a place of safety? 2nd, Whose fault was it that the vessel was not taken there? Was it the captain's or the pilot's fault? The jury were unable to agree in an answer to the first question. In answer to the second they found that neither the captain nor the pilot was guilty of negligence. On that finding the learned judge directed a verdict for the plaintiff, the damages to be assessed out of court, leave being reserved to move to enter a verdict for the defendants, the Court to have liberty to draw inferences of fact not inconsistent with the finding of the jury.

In Michaelmas Term, 1865, a rule *nisi*, pursuant to leave reserved, to enter a verdict for the defendants, was obtained on the ground that the money paid into court was sufficient to cover the damages legally recoverable in the action, the amount claimed for the injury by the "hogging" of the ship being too remote; and for a new trial, on the ground of misdirection by the judge in entering the verdict for the plaintiff on the finding of the jury, and that there was a miscarriage in the finding of the jury, and that the verdict was against the weight of evidence.

Jan. 19, 20. *Mellish, Q.C., Cooke, Q.C.*, and *Dowdeswell*, shewed cause. The plaintiff is entitled to recover for the damage done to the ship by her grounding, as well as the expense of bringing her down to the defendants' dock. The injury was the direct consequence of the defendants' breach of their contract, and occurred to the subject-matter of that contract. The case, therefore, differs from *Hadley* v. *Baxendale* (1), where a

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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correct rule, it is admitted, was laid down, but one which should not be extended: see per Crompton, J., in *Smeed* v. *Foord* (1); *Randall* v. *Raper* (2), *Collen* v. *Wright* (3), *Gibbs* v. *Trustees of the Liverpool Docks* (4), *Bridge* v. *Grand Junction Railway Company.* (5)

[POLLOCK, C.B. The defendants will probably contend that the ship ought to have been in a condition to encounter the possible peril arising from unavoidable delay.]

The plaintiff prepared his ship properly for the passage to the dock. Although it was his duty, not wantonly to increase the risk, he was surely not bound to have prepared his ship with ballast, &c., to meet the contingency of a breach by the defendants of their contract. As to the misdirection imputed, the verdict was rightly entered on the finding of the jury, that there was no fault in either the captain or the pilot. Having found that fact, there was no need to answer the first question put to them.

[They also contended that the verdict was supported by the evidence.]

Huddleston, Q.C., Gray, Q.C., and *Henry James* in support of the rule. The damage to the ship was neither the natural consequence of the defendants' breach of contract, nor within the contemplation of the parties. It is therefore not recoverable: *Hadley* v. *Baxendale* (6), *Fletcher* v. *Tayleur* (7); per Lord Campbell, C.J., in *Smeed* v. *Foord* (8); 2 Kent's Commentaries, 10th ed., p. 711; *Sedgwick on Damages*, 2nd ed., c. 3, pp. 57-67. The expense of bringing the ship down was the only natural consequence. That the ship herself was injured may have depended on a number of other circumstances besides the defendants' breach of contract, *e.g.*, the stormy weather, or the fact of the ship not being ballasted to go, if necessary, into deep water. Suppose she had been run down, whilst at anchor, by another vessel, could it

(1) 1 E. & E. 602; 28 L. J. (Q. B.) 178.

(2) E. B. & E. 84; 27 L. J. (Q. B.) 266.

(3) 7 E. & B. 301; 26 L. J. (Q. B.) 147. s. c. in error 8 E. & B. 647; 27 L. J. (Q. B.) 215.

(4) 1 H & N. 439; 28 L. J. (Ex.) 57.

(5) 3 M. & W. 244.

(6) 9 Ex. 341; 23 L. J. (Ex.) 179

(7) 17 C. B. 21; 25 L. J. (C. P.) 65.

(8) 1 E. & E. at p. 613; 28 L. J. (Q. B.) at p. 182.

have been argued that the defendants would have been liable? Yet the accident which happened was as unconnected with their fault as the result of a collision would have been.

[*Mellish, Q.C.*, referred to *Davis* v. *Garrett* (1), in which the plaintiff put on board the defendant's barge lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course. During the deviation a tempest wetted the lime, and the barge taking fire, the whole cargo was lost, and the defendant was held liable.]

That case is distinguishable because the defendant's was a continuing breach. Again, taking the other branch of the rule in *Hadley* v. *Baxendale* (2), as a test the damage cannot have been within the contemplation of both the parties. The plaintiff certainly did not foresee it, or he would have put more ballast in his ship; and the defendants could not have foreseen either that the river would be so full of small craft, as to prevent the plaintiff's ship from returning to Wilmot's Wharf, or that it would blow so strong as to make it dangerous for her to go into deep water. Lastly, the verdict was wrongly entered. The most important question was left unanswered. It may be that the ship could have been taken to a place of safety, and if so the defendants are clearly not liable, although the jury have found that neither the captain nor the pilot were to blame in anchoring where they did. The finding, as it stands, is not clear enough to throw the responsibility of the accident on the defendants.

[They also contended that the verdict was against the weight of the evidence.]

Cur. adv. vult.

Feb. 8. The learned judges differing in opinion, the following judgments were delivered:—

MARTIN, B. [after referring to the pleadings, proceeded as follows]:— The facts proved are very simple and clear. On the 17th Nov., 1863, the ship *Lord Elgin* was in a dry dock at Newport, and upon the morning of the following day, by the direction of the dock-master of the defendants' dock, proceeded towards it for the purpose of entering it. She was in ballast. It was a very

(1) 6 Bing. 716. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.

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short distance from the dry dock to the defendants' dock, and she was towed by a steam-tug stern foremost, and arrived near the defendants' dock-gate about high water, when, in consequence of a chain of the dock-gate being broken or out of order, she could not be admitted. The captain of the *Lord Elgin* was unacquainted with the river and its navigation, and he directed the ship to be anchored where she was. In about three hours afterwards, upon the ebb, she took the ground, and sustained damage, and the present question is in respect of this damage. The 15*l.* was paid into court to cover the expense of bringing the ship down to the dock. There does not seem to have been any application made to the learned judge at the conclusion of the plaintiff's case to nonsuit or direct a verdict for the defendants upon the ground that there was no evidence to go to the jury; and witnesses were called for the defence. On the argument before us it was contended that, upon the evidence, the captain of the *Lord Elgin* acted improperly; that he ought not to have anchored where he did; that he ought to have done one of several things; that he ought to have gone back towards the dry dock, or have gone down to a place called West Point, where it was said the ship could have safely grounded, or gone into deep water and there anchored.

The master stated reasons why, in his opinion, none of these things ought to have been done. It was also alleged that the ship was not sufficiently ballasted. According to the judge's note, it was contended on behalf of the defendants that the damage was too remote, and was unconnected with the cause of action, and upon this point he gave leave to move. He then proposed two questions to the jury—First, whether there was, in fact, any place of safety to which the vessel might have been taken; upon this question the jury could not agree: Secondly, whether both the captain and the pilot did the best they could, under the circumstances, and were either of them guilty of any negligence; to this the jury answered that they both did the best they could, and that neither of them were guilty of negligence. Upon this finding the learned judge directed the verdict to be entered for the plaintiff (the amount of damages having been agreed to be referred), and he gave the defendants leave to move, with power to the Court to draw any inferences upon the facts consistent with the finding of

the jury. The learned judge adds that the facts were entirely for the jury, and that he does not disapprove of their finding. I concur with him, and I think his direction that the verdict should be entered for the plaintiff was right in point of law.

The question of damages is of constant occurrence; it occurs in almost every action of contract except contracts for the payment of a certain fixed sum of money, and necessarily in every action for a wrong. Ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold, on agreements for the sale of land, for breaches of promise to marry, for the acceptance or non-delivery of stock or shares, and an infinite variety of others might be named. So, also, in actions for wrongs, it occurs every day; for instance, in actions for injuries sustained by accidents on railways and by collisions, which now constitute a considerable number of the causes tried at *Nisi Prius;* in actions for libel and slander, for assault or false imprisonment, and in numberless other cases. In some instances the measure of damages is fixed and ascertained by long established usage; for instance, for the non-delivery of goods which are the subject of common sale in the market, I apprehend a judge is bound to tell the jury that the measure of damages is the difference between the contract price and the market price, and that if he does not, his summing up would be liable to objection: and there are other cases in which like long usage has fixed the measure of damages. So, also, in some cases the matter of damages has been the subject of decision in the superior courts, and I apprehend that when this has been so, the decision is a binding authority upon the same and other courts in like manner and to the same extent as other decisions. For instance, the case of *Hadley* v. *Baxendale* (1), which was frequently referred to in the argument, is a decision of this kind. The plaintiffs, who were millers, had delivered to the defendants, common carriers of goods at Gloucester, a broken iron shaft, to be carried by them to Greenwich and delivered to an engineer there, in order to enable him to use it as a model for making a new shaft. They were told that the mill was stopped in consequence of the shaft being broken, and they promised that if the shaft was sent before a certain hour it would be delivered at

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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Greenwich the following morning. The delivery of the shaft was delayed by some neglect, and the plaintiffs did not receive the new shaft for several days after the time they otherwise would have done, and they claimed damages for the loss of profit which they would have made had the new shaft been delivered earlier. The late Mr. Justice Crompton left the case generally to the jury, who found a verdict for the plaintiffs. A rule was granted by the Court of Exchequer for a new trial for misdirection, because that they were of opinion that the judge ought to have told the jury to exclude the loss of profits in estimating the damages. This case is, therefore, an authority that in a similar case such loss of profit cannot be made an element of damages, and must be excluded; but it is an authority no farther, and anything said by the Court in delivering judgment is to be judged by its being consonant to law and reason. The decision in *Hadley* v. *Baxendale* (1) is, therefore, no authority whatever in the present case, for no loss of profits is claimed, nor is it an authority that loss of profits is not a legitimate element of damages in many other cases; for instance, in a railway accident whereby a tradesman or workman is prevented from attending to his business by the injury sustained. The loss of profits in such cases is a constant element of damages, and in a case tried the other day at Liverpool, where so large a sum as 7000*l.* was given in a case under Lord Campbell's Act, the sole element of damages was the loss of profits of the deceased in his profession of a surgeon, and no objection was made on this ground, and I have no doubt whatever, that if the judge had told the jury to exclude it, there would have been ground of misdirection.

In regard to the present case, there is no established rule and no decision, and the general rule is to be applied. This rule is, that the damage to be compensated for ought to be proximate to, and not remote from, the breach of contract or the wrong, and ought fairly, and reasonably, and naturally to arise from them. I do not adopt the qualifications mentioned by Mr. Baron Alderson in the judgment in *Hadley* v. *Baxendale* (1) as applicable to every case. They may have been perfectly right there, but they are not of universal application. "'Naturally,'" he says, "means, according to the usual course of things;" but contracts are infinite in

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

variety, and suppose, as in this case, no such claim for damage has ever been known to have been made, no usual course of things exists; but the damages to be recovered by the plaintiff are not, in my opinion, therefore to be nominal. And he proceeds to say, "such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it." Now this may properly enough be taken into consideration in the case of carriers and their customers, but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed, and not broken, and in the infinite majority of instances the damages to arise from the breach never enter into their contemplation at all. As to *Hadley* v. *Baxendale* (1), I was a party to it, and have no desire to depreciate it, but in *Boyd* v. *Fitt* (2), the Court of Exchequer in Ireland dissented from it, and approved of the views of the late Mr. Justice Crompton [*Smeed* v. *Foord* (3)] and Sir James Wilde [*Gee* v. *Lancashire & Yorkshire Railway Company* (4)], as being the sounder expositions of the law as to remoteness of damages. The general rule is, therefore, to be applied to the present case, and ought, as all other general rules, to be fairly, candidly, and impartially applied. It has been said that the damage sustained here has been very great. Now, I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damage be 10*l.* or 10,000*l.* is immaterial.

The circumstances are these:—In pursuance of the defendants' contract to admit the ship into the dock at a certain time upon a certain day, the ship was brought to the entrance of the dock. The defendants could not admit her, in consequence of a defect in a chain of the dock-gate, and their contract is admitted to have been broken. No blame attaches to them; it was their misfortune that the chain had been broken. The ship was then left in the river, which is one emptying itself into the Bristol Channel, where the tide flows and ebbs to a very great height. The captain had to decide what was to be done under the circumstances in which he was placed. Four courses have been suggested as open to him:

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.
(2) 14 Ir. Com. Law Rep. 43.
(3) 1 E. & E. 616; 28 L.J. (Q.B.) 183.
(4) 6 H. & N. 221; 30 L. J. (Ex.) 11.

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one, that he should remain and anchor where he was; secondly, that he should have gone up the river towards the place from whence he came; thirdly, that he should have gone down to West Point, where it was said the ship would, upon the ebb, have settled upon soft mud; and, fourthly, that he should have gone into deep water, where the ship would have always been afloat. Now, I think the defendants had a right to a *bonâ fide* and reasonably sound judgment exercised upon this matter. The captain decided upon remaining where he was. The tide was ebbing and the weather was threatening. If either of the three other courses had been adopted, it might have been that the ship would have sustained no damage, but it might have been that she would have been totally lost. But I think this was a question for the jury, and that they have decided it. They have found that the captain did the best he could under the circumstances, and was not guilty of any negligence. The consequence was that, when the tide ebbed, the ship took the ground, and sustained damage, and the question which has been argued before us is, that this damage is too remote and so unconnected with the cause of action that it must, as matter of law, be borne by the plaintiff, and that the defendants cannot be responsible for it. I do not concur in this view. There has been damage—it must be borne by some one. Neither the plaintiff nor his captain are in the slightest default. If the defendants had performed their contract no damage would have occurred. In consequence of their default the captain was compelled to exercise his judgment and discretion, and the jury have found he did the best he could, and was guilty of no negligence, by which I understand that in deciding to remain where he was he exercised such judgment and discretion as became a reasonable and prudent man. His doing so was no doubt the immediate cause of the damage, but in my opinion his remaining there was in contemplation of law the same as if the ship had been compelled to remain there by a *vis major*.

1 Q.B.D. 176

The rule is that the damage must be proximate (not immediate), and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ; but many instances could be mentioned in which damages much more remote than the present were held to be the subject

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of compensation, as in *Powell* v. *Salisbury* (1), and *Byrne* v. *Wilson*. (2)

There is a case of constant occurrence at Guildhall. A barge is injured by a collision in the Thames; she is taken to the nearest convenient and fitting place on the shore. Upon the ebbing of the tide she comes down upon a pile, and sustains further damage. My own belief is that compensation for such damage has been recovered over and over again without objection, and upon referring to some gentlemen at the bar, whose experience upon the subject is the greatest in the profession, I have been assured that it has continually been so. Such damage is precisely analogous to the present. Some possible cases were mentioned in the argument, and it was asked whether the defendants would have been responsible. One was, if the ship had been run down by another ship when at anchor. I think the liability in such cases would depend upon the circumstances, and a material one would be whether the running down ship was in the wrong. Another case put was, if the ship had been upset where she was anchored in a hurricane. This, I think, would raise a question for the jury, whether, in all human probability, the same misfortune would not have happened to the ship, wherever in the river she happened to have been. In my opinion the discussion of instances like these are of very little bearing or weight, if the facts of the case to be adjudicated upon are clearly and well defined. The question of damages in each case must be determined upon its own circumstances.

But I think the point is decided by the authority of *Jones* v. *Boyce*. (3) The plaintiff there was a passenger by a stage coach, a rein broke, the coachman drove the coach towards the side of the road, and one of the wheels was stopped by a post. The plaintiff jumped off, and his leg was broken, and he brought the action against the coach proprietor for damages. Lord Ellenborough said there were two questions for the jury: first, as to the defendant's default in regard to the rein, which is immaterial to the present case. The second was whether the defendant's default was conducive to the injury which the plaintiff had sustained, for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the

(1) 2 Y. & J. 391. (2) 15 Ir. Com. Law Rep. 332. (3) 1 Stark. 493.

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plaintiff as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action was not maintainable. Amongst observations upon the peculiar circumstances of that case, he said that it was for the consideration of the jury whether the plaintiff's acts were such as a reasonable and prudent mind would have adopted; and he added, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." I think the present case is analogous. The defendants did not perform their contract to admit the vessel into the dock. They thereby imposed upon the captain four perilous alternatives. He adopted one. The jury found that he did the best he could, and was guilty of no negligence, and damage ensued to the ship. In my opinion the defendants' default directly conduced to this damage, and they are responsible for it, upon the principle enunciated by Lord Ellenborough in *Jones* v. *Boyce* (1), which is equally good law and good sense. For these reasons I think the damage is not too remote, that the learned judge submitted the right question to the jury, and I concur with him that the verdict is unobjectionable, and I think, therefore, that the rule should be discharged.

POLLOCK, C.B. This case comes before us on a point reserved at the trial, viz., "Whether the damages were too remote;" and to assist our judgment we have, first, the notes of the learned judge taken at the trial; secondly, the answer of the jury "that the pilot and the captain did the best they could under the circumstances, and were neither of them guilty of any negligence," and we have the fact that the jury (who were locked up till a late hour) could not agree on the question "whether there was in fact any place of safety to which the ship might have been taken," and the questions for our decision seem to be, first, ought the verdict to stand, not a verdict found by the jury, but entered for the plaintiff by the learned judge on the jury answering one question and being unable to agree upon another question, which we think the more important and decisive of the two; or, secondly, ought we to enter the verdict for the defendants? or, thirdly, ought we to direct a new trial?

In deciding these questions it is necessary to ascertain the facts of the case as found by the jury, for with evidence so contradictory

(1) 1 Stark. 493.

and repugnant we cannot find any verdict ourselves. It is not our province. If the facts can be ascertained, then what is the law applicable to them? We apprehend when the facts of the case are known it is the province of the Court to say for what matters damages are to be given, but the amount of damages is a question for the jury quite as much as the credit due to the witnesses. When the result of the evidence is uncertain it is for the jury to find the facts, and they will therefore often have to find whether the facts fall within the rule of law to be laid down on the subject.

The case of *Hadley* v. *Baxendale* (1) was cited at the trial and much commented on during the argument. That case was very much considered. The argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord Wensleydale, the late Baron Alderson, and my brother Martin were parties to it, and it is due to Lord Wensleydale and the late Baron Alderson to say that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analyzing and discussing them, and as far as my brother Martin is concerned, in addition, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any decision. And certainly it does not lessen the authority of that case that Lord Campbell in *Smeed* v. *Foord* (2) said that it merely affirmed what was to be found in 2 Chancellor Kent's Commentaries 665, in Pothier, and in all the other authorities in the French code; and it may be added that Mr. Justice Crompton, against whose summing up it was directed, in that same case said he agreed with it as far as it went, which we consider to be agreeing with it altogether. That decision was not presented as any new discovery in jurisprudence, but we think it put in a clearer and more distinct light a principle which had been previously recognised in prior cases, and the want of which in the English law had been pointed out. The authorities are all collected in a note to *Vicars* v. *Willcocks* in the second volume of Smith's Leading Cases, fourth edition, by Mr. Justice Willes and Mr. Justice Keating. It is quite true, as remarked by Sir James Wilde, in *Gee* v. *Lancashire*

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. (2) 1 E. & E. 602; 28 L. J. (Q.B.) 178.

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and Yorkshire Railway Company (1), that the case is not applicable to, and does not decide, every case. No rule, no formula could do that. Cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees. No two are exactly alike, and one description cannot be applicable to all. No precise positive rule can embrace all cases, and notwithstanding any rule of law that may be laid down it must be admitted after all that the question of the amount of damages is one for the jury and the jury only, and provided the law on the subject be properly laid down by the presiding judge and then the amount of damages be left at large for the jury, we apprehend a Court would not interfere with their verdict because the jury had apparently come to some compromise among themselves and had not strictly observed the supposed rule of law. We think that the decision of twelve jurymen instructed from the bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would practically lead to a result often more just and equitable than any mere rule of law could arrive at; and that there may be no mistake as to our meaning we may add, that should this case go to a second trial, some of the jury might think the plaintiff entitled to recover the whole damage, others might think it the height of imprudence on the part of the master to attempt to remove a vessel from a dry dock to a wet dock about the time when the wind was blowing a hurricane, which from his evidence seems to have been the case, and from which charge of imprudence the verdict of the jury has not relieved him. The result might be a compromise which we are confident the Court would not, and which we think they ought not, to disturb.

We think we are not able to determine from the materials before us whether or no the loss was occasioned by circumstances which, according to the case of *Hadley* v. *Baxendale* (2) and the other authorities, would make the dock company liable for the damage the ship sustained. If the state of the weather was the efficient cause of the loss, we think the defendants are not liable. Now as to the state of the wind, the evidence of the mate is, "Not much wind, blowing pretty stiff, a fresh breeze." The

(1) 6 H. & N. 221; 30 L. J. (Ex.) 11. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.

evidence of the captain was, "It was only a few hours before a perfect hurricane." James Dunster, the master-rigger, says, "It was blowing so hard it would not have been safe to take her into deep water." If the weather was such that on being excluded from the dock she had no alternative but to perish on account of the gale or hurricane, which seems to me to have been the opinion of the master, then it may be doubted whether she ought to have been taken to the dock-gates at all in such a state of the weather, and the opinion of the jury by a verdict should have been obtained on these and other circumstances, and the verdict ought to have been found by them on a larger issue than whether the master and the pilot did their best after they found the vessel could not be received into the dock, which I take to be the only finding of the jury. It is clear that the pilot thought that the master was obstinate and determined to do nothing to save the ship.

We cannot find the defendants liable to this damage because the jury were disposed to relieve the captain and the pilot from the odium of a charge of negligence. The verdict of the jury ought to have gone more into the merits in order to fix the defendants with these damages. What the jury did not find, and could not agree upon, was quite as important as what they did find, and the result of their verdict seems to be, "We cannot agree as to the liability of the defendants; but we desire to throw no blame on the captain or the pilot." We are therefore of opinion that the jury have not found enough in point of fact to enable us to decide that the verdict entered for the plaintiff is what would have been their verdict, or (referring to the evidence actually given) ought to have been, if the entire case had been left to them to find a verdict for the plaintiff or the defendant. Looking at the evidence, and the finding of the jury, we cannot come to any conclusion that would make the defendants responsible for any damage done to the vessel. If there was any place of safety to which the vessel might have been taken and could have been taken (which we think is included in the learned judge's question) we think the plaintiff is not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative, we think the plaintiff was clearly not entitled to recover, and we presume the

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judge would have directed a verdict for the defendants; but after many hours they could not agree, and it is plain that some of the jury were of opinion in the affirmative. It is true they found that neither the captain nor the pilot were guilty of negligence, but we think it very uncertain what they meant by that finding. They certainly did not mean by that finding inferentially to decide the other question, or they would have found it and not ultimately disagreed about it. If there was a safe place to which the vessel might and ought to have been taken, a verdict for the plaintiff would be a great act of injustice, and we are invited to find this for the jury by a process of reasoning, when the jury would not, apparently could not, and certainly did not, find it for themselves. As to entering a verdict for the defendants there is a similar difficulty (though perhaps not so great, because if the plaintiff does not establish his case the defendants are entitled to a verdict); but we think we cannot be certain what would have been the verdict of the jury, if they had gone into and decided upon the whole case for themselves. We think therefore, there ought to be a new trial.

CHANNELL and PIGOTT, B.B. expressed their concurrence with the judgment of the Lord Chief Baron: the former adding that he had not prepared a written judgment, because he considered that the question of law as to the remoteness of damages, was not ripe for the decision of the Court.

Rule absolute for a new trial.

Attorneys for plaintiff: *Marshall, Westall, & Roberts.*
Attorney for defendants: *Benj. Hunt.*

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Feb. 7.

Policy of Insurance—Atlantic Cable—Policy on Adventure.

The plaintiff caused himself to be insured with the defendant in a policy which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words:—"At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted each way . . . . the ship, &c., goods, &c., shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, at 10*l.* per share:" and, written opposite to the clause "touching the adventures, &c.," the words: "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved:—

Held, that the policy was "on the adventure" and not on the cable merely; and that the adventure, that is, "the successful laying down of the cable in one continuous length between Ireland and Newfoundland," having wholly failed, the plaintiff was entitled to recover as for a total loss.

Affd in Ex Ch 2 Ex 139.

DECLARATION on a policy of insurance dated 29th July, 1865, setting out the policy. It was a policy made on a common printed form of a marine policy, with interlineations and marginal additions. By it the plaintiff, through his agent, caused himself to be insured, "lost or not lost, at and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and *vice versâ*, the risk on the policy then to cease and determine, upon any kinds of goods and merchandizes, &c." (in the ordinary words of a marine policy,) the *Great Eastern* being the ship named. "The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers, in this policy are and shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, valued at 10*l.* per share."

In the margin, opposite the usual clause, "touching the adventures and perils which we the assurers are contented to bear, and do take upon us in this voyage, they are of the seas, &c.," were

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written the words, "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and *vice versâ*, and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and *vice versâ*, shall be an essential condition of the policy." The premium was 25 guineas per cent.; the policy contained the usual warranty against average under 3*l.* per cent. unless general.

The declaration then averred that the defendant subscribed the policy for 200*l.*, "and became an insurer thereon to the plaintiff to that amount on the said Atlantic cable and premises;" that the cable was shipped, and that "the plaintiff was then and there, until and at the time of the loss hereinafter mentioned, interested in the said cable to the amount of all the moneys by him insured thereon;" that the ship sailed with the cable on board, and that during the continuance of the risk "the said Atlantic cable was by perils so insured against as aforesaid wholly lost." Averment of performance of conditions precedent. Breach, non-payment.

Pleas:—2. That the plaintiff was not interested in the cable as alleged. 3. That the cable was not lost by the perils insured against, or any of them, as alleged. 4. That the alleged loss of the cable was an average loss, under 3*l.* per cent, within the meaning of the policy, and was not a general average loss, and the ship was not stranded.

Issue thereon.

The case was tried before Martin, B., at the Liverpool Winter Assizes, 1865, and a verdict was found for the plaintiff for 200*l.* The facts are sufficiently stated in the judgment of the Court. (1)

In pursuance of leave reserved at the trial, a rule was afterwards obtained to enter a verdict for the defendant, on the grounds that the loss was not any loss by the perils insured against, or if any, only an average loss, and that there was no evidence that it was higher than 3*l.* per cent; or to reduce the damages, on the ground that, if any loss, it was an average loss.

(1) Post p. 196-7.

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Jan. 31. *S. Temple, Q.C.*, and *L. Temple*, shewed cause. The express words inserted in the present policy, distinguish it from that sued upon in *Paterson* v. *Harris* (1), which was a policy in the ordinary form. There the policy was held to be a policy on the cable, but the present policy is on the undertaking. It is an undertaking in which the plaintiff has an interest, and that interest, on the occurrence of a total loss, becomes the underwriter's salvage. The undertaking has totally failed, and if the attempt to lay the cable be repeated, it will be a new adventure.

Brett, Q.C., and *Quain*, in support of the rule. First, this was an insurance on the cable, which is not lost. In construing this instrument three rules must be observed. First, it is in form a marine policy, and must therefore be construed as such; second, effect must be given to all the words and stipulations of it taken together; third, the construction must be governed by the construction previously put by the courts upon a similar instrument. It must, therefore, be taken to be a policy on an insurable interest, within the decisions as to insurable interest on marine policies. If it were otherwise, it would be merely a bet, and illegal. What the interest is, is to be seen from the clause, "valued at 200*l.* on the Atlantic cable, value say on twenty shares at 10*l.* per share." These words are similar to those occurring in the policy in *Paterson* v. *Harris* (1), and it was there held that the policy was a policy on the plaintiff's interest in the cable. It could not be on the shares themselves, which, as was said in that case, could not be put on board ship, and were never in peril from the risks insured against; but their value wholly depends on the cable, and therefore practically an interest in shares is the same as an interest in the cable, and an insurance on the latter secures the former. The doctrine as to abandonment is inapplicable to shares, neither are they within the description given of an insurable interest, in Arnold, Ins., Vol. I., p. 281 (2nd ed.), and by Lawrence, J., in *Lucena* v. *Crawford*. (2) To construe this again, as a policy on the adventure, would be unreasonable, for if the cable were laid the whole way across, but with a fault capable of being remedied a few miles from the shore, the shares would rise and not fall in value,

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 354. (2) 2 B. & P. (N.R.) 269—300.

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yet on the plaintiff's contention, the actual adventure having failed, he would recover for a total loss. In these points the case is in effect governed by *Paterson* v. *Harris* (1), where the policy was substantially in the same terms with this, with the difference that the duration of the risk is here extended. Secondly, the loss is not by the perils insured against; whether the policy is on the cable or on the shares, all that is insured against is loss or deterioration in the value of the cable, or of the shares, by sea perils to the cable. The ordinary sea risks are first enumerated, and the additional words must be interpreted with reference to them; so interpreted, they will mean *extraordinary* sea perils. But the accident here was not due to any sea peril, but to a defect in the cable itself, which made it necessary to take it in; or if that is treated as too remote a cause, it was at least the weight of the cable itself which caused it to part whilst being hauled in. Thirdly, it was not a total loss, whether the cable or the shares formed the subject matter of insurance. It could only be total on the supposition that the insurance was on the adventure, and this, as has been already shewn, would be illegal, as it would be illegal to insure the arrival of a train at a particular time, although interests of great amount might depend on its punctuality. In fact to treat the loss as total it must be said, not that the interest in the adventure is insured, for in that case, the interest still existing, and being of some ascertainable value, the loss would not be total; but that the adventure, apart from the plaintiff's interest in it, that is the adventure considered merely as an event, is insured, which is no more than a wager.

Cur. adv. vult.

Feb. 7. The judgment of the Court (Pollock, C.B., Martin, Channell, and Pigott, BB.) was delivered by

Ante 194

MARTIN, B. This is a rule to enter a verdict for the defendant, in a case tried before me at the last Liverpool assizes. The verdict was entered for the plaintiff for 200*l.*, being a total loss upon a policy of insurance. The facts are these:—The Atlantic Telegraph Company were about to lay down an electric cable between Ireland and Newfoundland. The cable had been put on

(1) 1 B. & S. 336; 30 L. J. (Q. B.) 354.

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board the *Great Eastern* steam ship; and it was intended that she should proceed from Ireland to Newfoundland, and convey and lay down the cable as she went along. The *Great Eastern* left Valentia in Ireland on the 23rd July, with 2200 miles in length of cable on board, and on the 2nd August had laid down from 1100 to 1200 miles of it. Upon that day, in consequence of the electric current not acting, some of the cable was being drawn back into the ship, and whilst this was being done a part of the cable which was on board broke, and the broken end fell into the sea. Some fruitless endeavours were made to raise it, but ultimately the *Great Eastern* returned to Sheerness with the remainder of the cable (about 1200 miles in length) on board, where it now is, and it is hoped by the directors that the part saved may be made available for another attempt. The Atlantic Telegraph Company is a joint stock company, and the plaintiff was the owner of 20 shares of 10*l.* each in it. The defendant underwrote a policy on the 29th July for 200*l.*, and the question is whether the plaintiff is entitled to recover as for a total loss, or any smaller sum. The contract between the parties is contained in a paper, which was the common printed form of a marine policy. It states that the plaintiff's agent caused himself to be insured "at and from Ireland to Newfoundland, the risk to commence at the loading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and *vice versâ*, the risk on the policy then to cease and determine." The ship was the *Great Eastern*. The goods, &c., were valued "at 200*l.* on the Atlantic cable, value, say on 20 shares at 10*l.* per share;" and in the margin, opposite the usual clause (touching the adventures and perils which we the assurers are contented to bear, &c.) there was written as follows:—"It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until 100 words be transmitted from Ireland to Newfoundland, and *vice versâ;* and it is distinctly declared and agreed that the transmission of the

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said 100 words from Ireland to Newfoundland, and *vice versâ*, shall be an essential condition of the policy." The premium was 25 guineas per cent., and the defendant underwrote the policy for 200*l.*

The contract is partly written and partly printed, and the agreement between the parties is to be ascertained by the words of it. The circumstance that it is upon the printed form which is usually adopted for a common marine policy is wholly immaterial, if the language used and adopted by the parties shew that the insurance extends further than marine policies ordinarily do. In the present policy the risk of the insurance is declared to commence from the loading of the cable on board, and to continue until it be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted to and fro, when the risk is to cease and determine. Now, so far, the words express that the subject matter of insurance was the cable, but in the subsequent part of the policy it was declared to be agreed that, in addition to the ordinary perils and casualties insured against in the common marine policy, the insurance was to cover *every risk and contingency attending the conveyance and successful laying down of the cable.* It seems to me that words cannot be used more apt and fit to express that the underwriter contracted to insure against the risk and contingency which has happened, viz., the unsuccessful attempt to convey and lay down the cable. It seems to me that what has occurred is within the very words of the contract: it was a risk and contingency which attended the conveyance of the cable, and the unsuccessful attempt to lay it down. In truth, the policy is not merely on the cable but on the adventure.

The second question is whether the loss be total or partial. I think it total. The adventure in respect of which the assurance was effected was the successful laying down of the cable, which was loaded on board the *Great Eastern*, in one continuous length between Ireland and Newfoundland. This has wholly failed; and in my opinion the circumstance that one half of the cable has been saved is immaterial. The assurance was upon the adventure, and even if it had been merely upon the cable, it was upon the entire continuous cable, and not on a portion of it. A case was cited, *Pater-*

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son v. *Harris* (1), which was supposed to have some bearing upon the point: it really had none whatever. It was an action upon a policy in the common form, and the Court held that what occurred there was not a loss by "perils of the seas." It may possibly be that the loss in the present case it not a loss by perils of the seas; but upon this it is unnecessary to give an opinion, as I think the misfortune which has occurred is distinctly and plainly within the words of the policy, and the risk and contingency against which the defendants contracted to insure.

Rule discharged.

Attorneys for plaintiffs: *Norris & Allen.*

Attorneys for defendants: *Marshall, Westall, & Roberts.*

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Feb. 26.

Copyhold—Easement—Support—Negligence.

The owner of freehold land and copyhold land adjacent to each other sold the copyhold land, and by a deed of even date with the surrender the purchaser covenanted and granted that the vendor, his heirs, &c., might work in the adjoining freehold land, without being liable to make compensation for any injury caused by such working to certain buildings, authorized by the deed to be erected on the copyhold land, and that the purchaser, his heirs, &c., would indemnify the vendor, his heirs, &c., against any claims for such damage. This deed was not entered on the court rolls, nor referred to in the surrender. The copyhold land was afterwards conveyed enfranchised by the purchaser and the lords of the manor to the Church Building Commissioners, under whom the plaintiff took. Neither the lords of the manor, nor the Commissioners, nor the plaintiff, had notice of the deed.

The defendant, who took the adjoining freehold land under the original vendor, having by working the mines in it caused the land of the plaintiff to sink, and damaged the buildings thereon:—

Held, that he was not protected by the above-mentioned deed from liability to make compensation to the plaintiff.

Semble (per Martin, Channell, and Pigott, BB., Pollock, C.B., dissentiente), that if both lands had been freehold the defendant would still have been liable.

DECLARATION: 1st count, That the plaintiff was possessed of land, with a house, out-buildings, and wall thereon, in his own occupation, and by reason of the premises was entitled to have,

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 354.

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and in fact had, the same supported by the land adjacent to, and by the soil and minerals under the same; yet the defendant wrongfully, &c., dug out and removed the land adjacent to, and the soil and minerals out of the plaintiff's land, without leaving sufficient and proper support for the same, whereby the same sank and gave way, and the buildings were injured, and the plaintiff's estate deteriorated.

2nd count, That the defendant so wrongfully, &c., dug and worked mines adjoining land and buildings of the plaintiff, that the plaintiff's land and buildings gave way and sank, and the buildings were injured, and the plaintiff's estate deteriorated.

Plea 3, To so much of the declaration as relates to injury to the house, out-building, and wall, in the first count, and to the buildings in the second count mentioned, that one Bickley was formerly seised in fee of certain lands adjoining the lands in the declaration mentioned, and in which lands (hereinafter called freehold lands) there were mines and minerals; and was also seised in his demesne as of fee, at the will of the lord of the manor of Sedgley, according to the custom of the manor, of the land next mentioned; and that Bickley, being so seised, on the 6th of May, 1834, surrendered the land, being the land with a house, &c., thereon in the declaration mentioned, unto Charles Girdlestone his heirs and assigns, at the will of the lord, according to the custom of the manor, but subject to the provisions contained in a deed of even date.

By this deed Girdlestone, for himself, his heirs, executors, administrators and assigns, covenanted with Bickley, his heirs and assigns, that Bickley, his heirs and assigns, &c., should at all times have full liberty, license, power, and authority, and which liberty, license, power, and authority was thereby given and granted by Girdlestone, to make such and so many roads, levels, &c., in and under the surface of certain land coloured red in an endorsed plan, as might be necessary for the purpose of enabling Bickley, his heirs, &c., not only to get and carry away any mines of coal and ironstone, or other mines or minerals, in or under any other lands belonging to Bickley, but also to carry away any water which might obstruct the working the said last-mentioned mines and minerals, or for any other reasonable purpose whatever,

without being liable to make or pay any compensation to Girdlestone, his heirs, executors, administrators or assigns, for the privilege thereinbefore reserved, and notwithstanding any damage might be done to, or sustained by, Girdlestone, his heirs or assigns in the exercise of such privilege (here there followed a similar power of driving roads, &c., under the land surrendered).

And Girdlestone covenanted that he, his heirs and assigns, should only erect a church or chapel, and house for the use of a minister, and certain other specified buildings, upon the land so surrendered, and, lastly, that in case Bickley, his heirs or assigns, should, in working his or their mines and minerals, in any lands then belonging to Bickley, do any damage to any buildings authorized by the indenture to be erected upon the land so surrendered, then Bickley, his heirs, executors, administrators or assigns, should not be compellable, either at law or in equity, to make any compensation to Girdlestone, his heirs, executors, administrators or assigns, for any such damage; and Girdlestone, for himself, his heirs, executors, administrators and assigns, covenanted to indemnify Bickley, his heirs, executors, administrators and assigns, from and against any such damage, and from all claims and demands to be made by Girdlestone, his heirs, executors, administrators or assigns, for such damage, and from all costs, &c., respecting the same.

The plea then averred that Girdlestone became seised of the said tenements, and that the said tenements, by virtue of the said surrender, and subject to the said covenant afterwards, by divers surrenders and conveyances, became vested in the plaintiff, who thereupon became and was bound by the covenants and stipulations contained in the deed of the 6th of May, 1834; that on the 30th of October, 1841, the freehold land adjoining the land of the plaintiff and the mines therein, were by a deed of that date sold and conveyed by Bickley to Smith and Corser and their heirs and assigns, and were by them, on 24th March, 1863, sold and conveyed to the defendant, his heirs and assigns; that the house, out-buildings, and wall in the first count mentioned, and the buildings in the second count mentioned, were part of the premises erected on the land in the declaration mentioned, in pursuance of the stipulation in the said deed that Girdlestone,

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his heirs and assigns, should only erect thereon a church, &c.; that the damage in the declaration mentioned happened solely in consequence of the defendant's working in the adjoining freehold lands, and not from any working under the land in the declaration mentioned, and that such adjoining freehold lands were the lands mentioned in the first count of the declaration as adjacent to the land, house, out-buildings and wall of the plaintiff, and were the lands which contained the mines in the second count mentioned.

Replication, setting out verbatim the deed of 6th May, 1834, the surrender and admittance (which took no notice of that deed), and a subsequent deed of 4th June, 1836 (being a deed made under the Church Building Acts), by which Girdlestone and the lords of the manor conveyed the copyhold land enfranchised, to the Commissioners for building churches, for the purpose of building a church thereon; averring that the deed of 6th May, 1834, was not entered on the court rolls of the manor, and that neither the lords of the manor, nor the plaintiff, nor the commissioners, had any notice or knowledge of it, prior to the execution of the deed of 4th June, 1836; that a church was afterwards built on the land, and consecrated; that the plaintiff was on 25th October, 1852, presented to the benefice, and lawfully instituted and inducted, and was, before and at the time of the grievances complained of, in lawful possession and enjoyment of the land, house, &c., in the declaration mentioned, as incumbent; that the injuries in the third plea pleaded to were caused by the sinking of the land in the declaration mentioned with the house, &c., erected thereon, as in the declaration mentioned; and that the sinking of the land was not caused by the weight of the house, &c., but solely by the wrongful acts of the defendant in the declaration mentioned.

Demurrer and joinder.

The demurrer was argued in Hilary Term, 1865, by *Macnamara* for the plaintiff, and *Gray, Q.C.*, for the defendant, before Pollock, C.B., and Martin and Pigott, BB., but the fact that the plaintiff's land was at the date of the deed of 6th of May, 1834, copyhold, and had been since conveyed *enfranchised* to those under whom the plaintiff claimed, not having been then much insisted on, the case was now re-argued at the request of the Court with reference to that point.

On the present argument the question was also discussed whether, supposing the whole land formerly owned by Bickley, and part of which was conveyed by him to Girdlestone, to have been freehold, the right claimed by the defendant to withdraw support from the plaintiff's land without being liable for the consequent injury was a right which could by law be created so as to run with the lands; and whether, if it could, the deed of 6th of May, 1834, was so framed as to effect that purpose. Upon this point *Gray, Q.C.*, relied upon *Rowbotham* v. *Wilson* (1) in support of the defendant's right. *Macnamara* distinguished that case from the present, on the ground that it really proceeded on the special words of the act of parliament, and the powers of the commissioners to make the award which was there held valid; he argued that, even if such a grant as was here contended for would be valid between the surface owner and the owner of subjacent strata, (as in *Rowbotham* v. *Wilson,*) where the fact of such separate ownership would be itself notice of some unusual legal relation, it could not be so between the owners of lands lying horizontally adjacent to one another, where nothing but the ordinary rights would be supposed to exist. That further, the words of the deed in the present case were inconsistent with the idea of a *real* right being created by it; and that, in particular, the covenant to indemnify shewed that only a *personal* relation was intended to be constituted. He relied upon *Keppel* v. *Bailey* (2) and *Ackroyd* v. *Smith* (3), but no judgment was delivered on these points.

Nov. 8. *Gray, Q.C.* (*Staveley Hill* with him) in support of the demurrer. The copyhold land was bound by the covenants in the hands of Girdlestone, and of those who took through him as copyhold tenants; and they being so bound could not by acquiring the freehold interest of the lord liberate themselves from that obligation. He referred to *Smith's Leading Cases,* vol. 1, p. 44, (4th ed.), and *Glover* v. *Cope* (4), *Whitton* v. *Peacock* (5), there cited.

Macnamara, in support of the replication. The copyhold tenant holds by copy of court roll; the court roll constitutes

(1) 8 H. L. C. 348; 30 L. J. (Q.B.) 49. (2) 2 My. & K. 517.
(3) 10 C.B. 164. (4) 3 Lev. 326. (5) 3 My. & K. 325.

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his title, and he is bound only by what appears there. A mortgage not entered on the rolls would not bind a purchaser from the mortgagor without notice: *Watkins Cop.* vol. 1, pp. 116-7. Now, the replication states that the deed of 6th of May, 1834, was not entered on the court rolls, nor referred to in the surrender, and that the plaintiff takes under purchasers without notice. The plaintiff would, therefore, not be bound by the deed, even if the right claimed by the defendant were one which a copyhold tenant could confer, and if the plaintiff's rights were only those of a copyholder. But the right is not one which a copyhold tenant could create so as to bind even succeeding copyholders; his act in granting it would be a prejudice to the lord, and an act of waste, and would be itself a cause of forfeiture, as is the granting of a lease, the alienation of the land in any form, working for mines, &c.: *Watkins Cop.*, vol. 1, pp. 326, 331-3. Further, the plaintiff is himself, by virtue of the enfranchisement invested with the right of the lord, who could clearly not be bound by his tenant's act. The lord is not bound to take notice of anything but what appears upon the court rolls, *Peachey* v. *Duke of Somerset* (1); nor even to admit to a place on the court rolls any unusual provision; he is not compellable to accept a surrender burdened with trusts: *Flack* v. *Downing College.* (2) Since, therefore, the deed relied upon by the defendant never appeared upon the court rolls it did not bind the lord, nor was it in fact known to those who obtained the enfranchisement. The plaintiff is therefore in the position of a purchaser without notice of the lord's estate, which has passed to him entire and unburdened, and he would be entitled to enjoy this estate freely, even if the deed would have bound him as a mere copyhold tenant: *Watkins Cop.*, vol. 1, p. 362, *Brabant* v. *Wilson.* (3)

Gray, Q.C., in reply.

Cur. adv. vult.

Feb. 26. The judgment of the Court (Pollock, C.B., Martin, Channell, & Pigott, BB.) was delivered by

MARTIN, B. In this case a question arises between the owners

(1) Str. 447. (2) 13 C. B. 945; 22 L. J. (C.P.) 229.
(3) Law Rep. 1 Q. B. 44.

of adjacent lands as to the existence of a right to support, and as to the effect of a deed by which that right is supposed to have been affected. The property which now belongs to the plaintiff was, at the time when that deed was executed, of copyhold tenure, but has been since enfranchised; the defendant's land is, and always has been, freehold. The deed in question was executed on the conveyance of the copyhold land by the owner of both properties, who retained the freehold, and by it the surrenderee purported to grant to his vendor the right of disturbing the copyhold lands, by working the mines in the freehold. The case was argued before the Chief Baron, my Brother Pigott and myself in Hilary Term of last year, but the fact that the plaintiff's property had formerly been copyhold was not much alluded to. After that argument a written judgment was very carefully prepared by me, to the effect that, assuming both properties to have been freehold, the right claimed by the defendant did not exist, and that the plaintiff was entitled to recover. With this judgment my Brothers Channell and Pigott concurred, but the Chief Baron dissented from our view, and was of opinion that, assuming both properties to have been freehold, the plea was good, and the defendant entitled to succeed upon it. The case was argued before us a second time in last Michaelmas Term, and it was then insisted that, even if the defendant's contention were tenable on the assumption that both properties were freehold, yet the fact that the plaintiff's land was copyhold made all the difference. We are of opinion that this fact does make a difference, and that the plaintiff is not bound by the deed, even though it were established that in the case of freehold lands such a right could have been conferred by it as the defendant claims. The plaintiff is therefore entitled to the judgment of the Court on this point, and that being so, it is thought better not to read the judgment to which I have referred, the Court not being unanimous as to what would have been the effect of the deed if both the plaintiff's and the defendant's land had been freehold.

Judgment for the plaintiff.

Attorneys for plaintiff: *Benbow, Tucker, & Saltwell.*
Attorneys for defendant: *Hollings, Sharp, & Ullithorne.*

1866 HAUGHTON AND OTHERS *v.* EMPIRE MARINE INSURANCE COMPANY
Feb. 26. (LIMITED).

Ship and shipping—Marine policy—Construction—"At and from."

In a homeward policy the words "*at and from*" a port named are to be construed in their natural geographical sense, without reference to the expiration of an outward policy "to" the same place, and therefore the policy attaches as soon as the vessel arrives within the port named, and although not *safely moored*.

A vessel insured "*at and from*" Havana was injured by coming in contact with an anchor, after entering the harbour, and whilst passing over a shoal up to her place of discharge:—

Held, that the policy had attached.

DECLARATION on a valued policy of insurance on the ship Urgent, "lost or not lost, *at and from* Havana to Greenock," alleging that the ship when *at* Havana, and after the commencement and during the continuance of the risk, sustained injury by the perils insured against.

First plea, that the ship did not, when *at* Havana, after the commencement and during the continuance of the risk, sustain injury by the perils insured against.

Issue thereon.

The cause was tried before Montague Smith, J., at the Liverpool Summer Assizes, 1865, when the material facts proved were as follows:

The ship was insured from Nassau to Havana, and went to the latter place with a cargo of coals. The captain proved that he arrived at Havana, and took a pilot inside the harbour; that he then took a steam-tug. His instructions to the pilot were to take him to a clear anchorage. The tug took her up through the harbour and the shipping to a place called the "Regla Shoal," and when past the thick of the shipping above the city, the ship began to stir the mud, but was not felt to take the ground. The pilot then gave orders to let go the anchor, and that the tug should cast off; the anchor was let go, but the tug held on until the hawser which connected the ship with the tug broke; the pilot then left the ship, and she remained in that place. On the next morning the captain attempted to get her head to wind, but could not, and later in the day found that she had sustained

damage from the anchor of another ship. (1) She was afterwards got off, and her cargo was, by the direction of the purchaser, discharged at a place between the mouth of the harbour and the shoal.

The verdict was entered for the plaintiffs for 353*l.* 3*s.* 1*d.*, and leave was reserved to the defendants to move to enter a nonsuit or a verdict on the ground that the ship was not *at* Havana, within the meaning of the policy, when she sustained the injury, the Court to draw inferences of fact.

E. James, Q.C., in the following Michaelmas Term, obtained a rule nisi accordingly, against which

Brett, Q.C., and *Baylis* (Nov. 22), shewed cause. The ship had arrived *at* Havana, within the meaning of the policy, when the injury was received. The question is one of nautical phraseology, and to be decided by the ordinary use of the terms. Havana, in a policy of marine insurance, means the port of Havana, and the analogy of use shews that the ship was *at* Havana when she passed the mouth and entered the harbour; as a ship is said to be *at* London when she is at Gravesend, *at* Liverpool when she is in the Sloyne, and *at* Dover when she has passed between the piers, though she would be *off* Dover as long as she remained in Dover Roads in the open sea. This construction is favoured by *Bell* v. *Marine Insurance Company* (2), cited (but mis-stated) in *Phill. Ins.*, s. 933, where a representation that a ship had arrived "at" Limerick, was held to be satisfied by her having arrived at Grass Island, nine miles below the town of Limerick, though within the limits of the port. The only qualification to this natural construction is that the ship must arrive at the place named in safety, and it is admitted that the ship was in good physical safety when she entered the port. The defendants seek to add another qualification, namely, that the ship must have been safely moored; but this is an arbitrary addition not warranted by any decision. On the contrary, it is laid down by Lord Hardwicke in *Motteaux* v. *London Assurance Society* (3), that in a policy "at and from," the words "first arrival" are implied; see

(1) There was a conflict of evidence as to whether the ship struck the anchor, and was stopped by it, or whether she settled down upon it on the falling of the tide. (2) 8 Serg. & Raw. 98. (3) 1 Atk. 545.

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also *Palmer* v. *Marshall.* (1) It is accordingly laid down in *Phill. Ins.*, s. 932, that, "in insurance on a vessel 'at' a port, the risk generally commences from the time of its being there;" and *Patrick* v. *Ludlow* (2) is cited in support of that proposition; Mr. Justice Kent there says, "The true rule on this subject is, that 'at and from,' when applied to a ship, includes the period of her stay in the port, from *the time of her arrival there.* But 'at and from,' when applied to goods, means from the time those goods are put on board the vessel;" see also *Seamans* v. *Loring.* (3) The physical safety required as a condition of the policy attaching (*Arn. Ins.*, Vol. 1, p. 388 (3rd ed.); *Phill. Ins.*, s. 934) is different from the seaworthiness required for a voyage, and it is only necessary that, "while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage," per Lord Ellenborough, *Parmeter* v. *Cousins* (4), *Bell* v. *Bell.* (5) Lord Kenyon expressly lays down that "seaworthiness" is not necessary; *Smith* v. *Surridge* (6), *Forbes* v. *Wilson.* (7) Now there was no period up to the accident at which the vessel in the present case was not in this condition, and, therefore, at the period of the accident the policy had attached, the vessel having then arrived within the harbour. If, however, it were necessary to contend that the vessel was safely moored before the accident, this contention would be borne out by the evidence: *Angerstein* v. *Bell.* (8)

Potter (*E. James, Q.C.*, with him), in support of the rule. The present policy is a policy for the homeward voyage, including the period of the vessel's stay at the port, and the true construction of it is to make it supplement the outward policy. Now, the outward policy would expire twenty-four hours after the vessel had been safely moored; the period of twenty-four hours is an arbitrary extension of the risk expressed in the outward policies; but the safe mooring shews the period when the ship is considered to have arrived. This period (that is, the time when the outward

(1) 8 Bing. 79.
(2) 3 John. R. 10.
(3) 1 Mason R. 127, 139.
(4) 2 Camp. 235.
(5) 2 Camp. 475.
(6) 4 Esp. 25.
(7) Park. 472.
(8) Park 54.

policy would by the mere effluxion of twenty-four hours expire) is the period at which the policy "at and from" commences. Now, it could not be said that this period had arrived, for the vessel had not reached her destination; she was not at the place of discharge, nor was there any intention on the part of the master of casting anchor at this place as her mooring ground; but it was only in consequence of his thinking that she was grounding on the shoal that the anchor was let go. It resembles, therefore, the case of *Samuel* v. *Royal Exchange Assurance Company* (1), and that of *Zacharie* v. *Orleans Insurance Company* (2), cited in *Phill. Ins.* s. 968-9; where, in this same harbour of Havana, a ship which had moored under Moro Castle, one of the headlands at its mouth, twenty-four hours before the accident, was held not to be discharged from an outward policy "to" Havana.

Cur. adv. vult.

On 26th of February, Channell, B., said that himself and Pigott, B., concurred in opinion upon the case; that Martin, B., not having heard the whole of the arguments, took no part in the judgment; that they had not been able to ascertain whether the Chief Baron agreed with them; but that as the majority of their Court agreed in opinion, the parties were entitled to have the judgment upon the case. Accordingly the following judgments were delivered:—

CHANNELL, B. This was an action on a valued policy on the ship Urgent, lost or not lost, at and from Havana to Greenock, and the question for us to determine is, whether or not the risk had attached at the time when the damage occurred. A verdict was entered at the trial for the plaintiffs, and a rule has been obtained by the defendants to enter a nonsuit pursuant to leave reserved. The facts are before us on the judges' notes and in certain documents admitted in evidence, and we are to be at liberty to draw inferences of fact. It appears that the Urgent, having arrived off Havana, the captain engaged the services of a steam-tug and a pilot for the purpose of taking her to a clear anchorage. She was towed into the harbour, past the point where she ultimately dis-

(1) 8 B. & C. 119. (2) 5 Martin R. (N. S.) 637.

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charged her cargo, to a point at the head of the harbour, called the Regla Shoal. There she grounded, and received damage from the anchor of another ship. In my opinion she was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred *at* Havana, geographically speaking, and there is nothing which, to my mind, shews that the parties, at the time this policy was underwritten, contemplated any other meaning of the word "*at*." All the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port *at* which she is insured in a state of sufficient repair or seaworthiness to be enabled to be there in safety: see *Parmeter* v. *Cousins* (1), and *Bell* v. *Bell* (2), in the latter of which cases the ruling of Lord Ellenborough, C.J., at Nisi Prius, was upheld by the Court in Banc. Here, however, there seems to be no doubt that the ship was really within the harbour in good safety, and the loss occurred from a peril in the harbour, and in no way from any injuries she had received before her arrival. The ship being insured while at Havana is evidently, in the absence of any provision to the contrary, insured all the time she is there, and therefore the risk commences on her first arrival, as put by Lord Hardwicke in *Motteaux* v. *London Assurance Company*. (3)

Unless, therefore, we can say that her first arrival at the port is when she cast anchor there, instead of when she enters the port, our judgment must be for the plaintiffs. In many cases the nature of the port may be such that the two events may be identical. There may be nothing to shew the arrival till the vessel casts anchor. But here we have evidence as to the port of Havana which is sufficient, in my judgment, to shew that the arrival was before casting anchor. It has been argued that the first arrival, which must be no doubt in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think we cannot construe the terms of one contract by reference to those of another not referred to in it. And it is clear that there is no usage that the duration of the outward and homeward policies should not overlap, because the outward policy usually extends to twenty-four hours after the vessel is moored in good

(1) 2 Camp. 235. (2) 2 Camp. 475. (3) 1 Atk. 545.

safety. During those twenty-four hours there is no question that there is a double insurance, and therefore I see no ground for saying that the parties contracted subject to any usage that such a policy would not attach until the previous one had determined. If they had wished to make such a condition it might easily have been done; or if, having in view any special dangers, as shoals or the like, within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so; but as it stands it is from the first arrival, which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plaintiffs, that the rule be discharged.

PIGOTT, B., after stating the facts as above, proceeded. The sole question is whether the policy had attached. I am of opinion that it had. I agree with the plaintiff's counsel, that the language used by the parties ought to have a plain construction, and that as the ship had arrived geographically within the harbour of Havana, and was in safety there before the injury was received, the risk then commenced.

A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed. For the defendants it was argued that, Havana being an outward port as regards this ship, the meaning of the words *at and from* such outward port, was that the risk shall commence when the ship has so far performed her outward voyage that nothing remains to determine the outward policy but the effluxion of the twenty-four hours from her arrival, and that, so understood, this policy had not attached, inasmuch as the ship had not arrived at her place of discharge.

But it seems to me that this would be a very artificial construction to adopt, and we have no safe guide to conduct us to it. It might with equal plausibility be argued that the risk *at and from* a port should not commence till the insurance *to* that port ceased, which is at the end of the twenty-four hours, and not at the commencement of them. The answer to both suggestions seems to be that the construction of this contract cannot depend upon the contents of another and distinct one, which is wholly unconnected

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with it, nor is the Court called upon to know or assume that there is in fact any outward policy in existence.

This view is supported by the authority of Lord Hardwicke, in *Motteaux* v. *London Assurance Company.* (1) He mentions a case tried before him at Guildhall, in which he says: "It was doubted whether the words 'at and from Bengal' meant the first arrival of the ship at Bengal," and he adds, "it was agreed the words 'first arrival' were implied and always understood in policies." Now there can be no question about the sense in which Lord Hardwicke uses the words *first arrival,* viz., in contradistinction to her being moored in a particular place, or discharging her cargo. In *Parmeter* v. *Cousins* (2), Lord Hardwicke's report of the above case is mentioned, and the learned reporter adds, "there seems no doubt that the rule laid down by Lord Hardwicke, qualified by the principal case" (to which the note is appended), "is to be considered as established law upon the subject." The qualification thus alluded to is, that the ship shall be once in good safety at the port, a matter not in dispute in the present case.

This doctrine, and the authority for it, is to be found in several of the text books on insurance, and may be thus taken to have been long considered as the meaning of those who so word their policies. In *Arn. Ins.*, Vol. 1 (p. 28, s. 25, 2nd. ed.), it is the form recommended to parties to be adopted for their advantage in protecting the ship from the moment of her arrival.

I do not think it necessary to advert to the other questions raised, viz., whether in fact the ship had not anchored in the harbour before the damage was sustained, and at a place even further within it than her place of ultimate discharge; nor whether that would make any difference in the case. In my judgment the plaintiffs are entitled to keep their verdict, and the rule should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Norris & Allen.*
Attorneys for defendants: *Chester & Urquhart.*

(1) 1 Atk. 545. (2) 2 Camp. 235.

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXIX VICTORIA.

PEARCE AND ANOTHER *v.* BROOKS.

1866
April 17.

Contract—Void for Immorality.

One who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject matter of the contract to an immoral purpose cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act.

The defendant, a prostitute, was sued by the plaintiffs, coach-builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that they knew her to be a prostitute, and supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men:—

Held, that the plaintiffs could not recover.

DECLARATION stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay 50*l.* down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas was to be paid

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in addition to the 50*l.*, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, nonpayment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement, the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before Bramwell, B., at Guildhall, at the sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding, the learned judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

M. Chambers, Q.C., in Hilary Term, obtained a rule accordingly, on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used; and that if there was, the allegation in the plea that the plaintiffs expected

to be paid out of the receipts of defendant's prostitution was a material allegation, and had not been proved: *Bowry* v. *Bennett.* (1)

[POLLOCK, C.B., referred to *Cannan* v. *Bryce.* (2)]

Digby Seymour, Q.C., and *Beresford*, shewed cause. No direct evidence could be given of the plaintiffs' knowledge that the defendant was about to use the carriage for the purpose of prostitution; but the fact that a person known to be a prostitute hires an ornamental brougham is sufficient ground for the finding of the jury.

[BRAMWELL, B. At the trial I was at first disposed to think that there was no evidence on this point, and I put it to the jury, that, in some sense, everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, shewed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

Upon the second point, the case of *Bowry* v. *Bennett* (1) falls short of proving that the plaintiff must intend to be paid out of the proceeds of the illegal act. The report states that the evidence of the plaintiffs' knowledge of the defendant's way of life was "very slight;" and Lord Ellenborough appears to have referred to the intention as to payment not as a legal test, but as a matter of evidence with reference to the particular circum-

(1) 1 Camp. 348. (2) 3 B. & A. 179.

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stances of the case. The goods supplied there were clothes; without other circumstances there would be nothing illegal in selling clothes to a known prostitute; but if it were shewn that the seller intended to be paid out of her illegal earnings, the otherwise innocent contract would be vitiated. Neither is *Lloyd* v. *Johnson* (1), cited in the note to the last case, an authority for the plaintiffs, for there part of the contract would have been innocent, and all that the Court says is, that it cannot "take into consideration which of the articles were used by the defendant to an improper purpose, and which were not;" they had no materials for doing so. The present case rather resembles the case of *Crisp* v. *Churchill*, cited in *Lloyd* v. *Johnson* (1), where the plaintiff was not allowed to recover for the use of lodgings let for the purpose of prostitution. *Appleton* v. *Campbell* (2) is to the same effect.

M. Chambers, Q.C., and *J. O. Griffits*, in support of the rule. As to the first point, the expressions of Buller, J., in *Lloyd* v. *Johnson* (3), are strongly in the plaintiffs' favour, especially his remarks on the case of the lodgings: "I suppose the lodgings were hired for the express purpose of enabling two persons to meet there." But in this case it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness. But secondly, the last allegation in the plea is material, the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord Ellenborough in *Bowry* v. *Bennett* (4), are very plain, the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[BRAMWELL, B. At the trial I refused to leave this question to the jury, but it has since occurred to me that the matter was doubtful. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall

(1) 1 B. & P. 340.
(2) 2 C. & P. 347.
(3) 1 B. & P. at p. 341.
(4) 1 Camp. 348.

use it. Suppose, however, a person were to buy a pistol, saying to the seller that he means with it to shoot a man and rob him, is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it not also necessary that it should be part of the contract that he *shall* be so paid?]

Suppose a cab to be called by a prostitute, and the driver directed to take her to some known place of ill-fame, could it be said that he could not claim payment?

[BRAMWELL, B. If he could, this absurdity would follow, that if a man and a prostitute engaged a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test, therefore, of the question will be, whether in such an action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[MARTIN, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would, on our discharging this rule, be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

POLLOCK, C.B. We are all of opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say, that since the case of *Cannan* v. *Bryce* (1), cited by Lord Abinger in delivering the judgment of this Court in the case of *M'Kinnell* v. *Robinson* (2), and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever

(1) 3 B. & A. 179. (2) 3 M. & W. at p 441.

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considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of law was well settled in *Cannan* v. *Bryce* (1); that was a case which at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned judge (then Sir Charles Abbott) who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically *his* judgment; it was assented to by all the members of the Court of King's Bench, and is now the law of the land. If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly and minutely, but for civil purposes this is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my Brother Bramwell that the verdict was right, and that the rule must be discharged.

MARTIN, B. I am of the same opinion. The real question is, whether sufficient has been found by the jury to make a legal

(1) 3 B. & A. 179.

defence to the action under the third plea. The plea states first the fact that the defendant was to the plaintiffs' knowledge a prostitute; second, that the brougham was furnished to enable her to exercise her immoral calling; third, that the plaintiffs expected to be paid out of the earnings of her prostitution. In my opinion the plea is good if the third averment be struck out; and if, therefore, there is evidence that the brougham was, to the knowledge of the plaintiffs, hired for the purpose of such display as would assist the defendant in her immoral occupation, the substance of the plea is proved, and the contract was illegal. When the rule was moved I did not clearly apprehend that the evidence went to that point; had I done so, I should not have concurred in granting it. It is now plain that enough was proved to support the verdict.

As to the case of *Cannan* v. *Bryce* (1), I have a strong impression that it has been questioned to this extent, that if money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering. But, no doubt, if it were part of the contract that the money should be so applied, the contract would be illegal.

PIGOTT, B. I am of the same opinion. I concurred in granting the rule, not on any doubt as to the law, but because it did not seem clear whether the evidence would support the material allegations in the plea. Upon this point, I think that the jury were entitled to call in aid their knowledge of the usages of the day to interpret the facts proved before them. If a woman, who is known to be a prostitute, wants an ornamental brougham, there can be very little doubt for what purpose she requires it. Then the principle of law expressed in the maxim which my Lord has cited governs the case. It cannot be necessary that the plaintiffs should look to the proceeds of the immoral act for payment; the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it. The plaintiffs knew the woman's mode of life, and where the means of payment would come from,

(1) 3 B. & A. 179.

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and to require the proposed addition to the rule would be to make it futile. As to the expressions of Lord Ellenborough which have been relied on, I think they were only meant to give an illustration of what would be evidence of the plaintiffs' participation in the immoral act, and that we are not overruling anything that he has laid down.

BRAMWELL, B. I am of the same opinion. There is no doubt that the woman was a prostitute; no doubt to my mind that the plaintiffs knew it; there was cogent evidence of the fact, and the jury have so found. The only fact really in dispute is for what purpose was the brougham hired, and if for an immoral purpose, did the plaintiffs know it? At the trial I doubted whether there was evidence of this, but, for the reasons I have already stated, I think the jury were entitled to infer, as they did, that it was hired for the purpose of display, that is, for the purpose of enabling the defendant to pursue her calling, and that the plaintiffs knew it.

That being made out, my difficulty was, whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense, it was not for the same purpose. If a man were to ask for duelling pistols, and to say: "I think I shall fight a duel to-morrow," might not the seller answer: "I do not want to know your purpose; I have nothing to do with it; that is your business: mine is to sell the pistols, and I look only to the profit of trade." No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should still feel it, but that the authority of *Cannan* v. *Bryce* (1) *M'Kinnell* v. *Robinson* (2) concludes the matter. In the latter case the plea does not say that the money was lent on the terms that the borrower should game with it; but only that it was borrowed by the defendant, and lent by the plaintiff "for the purpose of the defendant's illegally playing and gaming therewith." The case was argued by Mr. Justice Crompton against the plea, and by Mr. Justice Wightman in support of it; and the considered judgment of the Court was delivered by Lord Abinger, who says (p. 441): "As the plea states that the money for which the action is brought was lent for the purpose of illegally playing and gaming therewith, at the

(1) 3 B. & A. 179. (2) 3 M. & W. 434.

illegal game of 'Hazard,' this money cannot be recovered back, on the principle, not for the first time laid down, but fully settled in the case of *Cannan* v. *Bryce*. This principle is that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced." This Court, then, following *Cannan* v. *Bryce* (1), decided that it need not be part of the bargain that the subject of the contract should be used unlawfully, but that it is enough if it is handed over for the purpose that the borrower shall so apply it. We are, then, concluded by authority on the point; and, as I have no doubt that the finding of the jury was right, the rule must be discharged.

With respect, however, to the allegation in the plea, which, as I have said, need not be proved, and which I refused to leave to the jury, I desire that it may not be supposed we are overruling anything that Lord Ellenborough has said. It is manifest that he could not have meant to lay down as a rule of law that there would be no illegality in a contract unless payment were to be made out of the proceeds of the illegal act, and that his observation was made with a different view. In the case of the hiring of a cab, which was mentioned in the argument, it would be absurd to suppose that, when both parties were doing the same thing, with the same object and purpose, it would be a lawful act in the one, and unlawful in the other.

POLLOCK, C.B. I wish to add that I entirely agree with what has fallen from my Brother Martin, as to the case of *Cannan* v. *Bryce*. (1) If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied; but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterwards it was turned to that use, neither *Cannan* v. *Bryce*, nor any other case, decides that his act would be illegal. The case cited rests on the fact that the money was borrowed with the very object of satisfying an illegal purpose.

Rule discharged.

Attorney for plaintiffs: *E. L. Levy.*

Attorneys for defendant: *Lewis & Lewis.*

(1) 3 B & A. 179.

1866
April 17.

BOLINGBROKE and Wife *v.* KERR.

Administrator.—Parties—Practice.

An administrator cannot sue in his representative character upon contracts made after the death of the intestate, in the course of carrying on the intestate's business.

The plaintiffs, husband and wife, sued the defendant for goods supplied to him by them in the course of carrying on the business of the wife's deceased father, whose administratrix the wife was. The goods so supplied were made of materials purchased out of moneys received on account of the intestate's estate:—

Held, that the wife was wrongly joined as a party, and that the husband must sue alone.

This was an action for goods sold and work done, brought by the husband and wife, suing in right of the wife as administratrix of her deceased father.

After the death of the father, in April, 1860, the male plaintiff married the daughter, who was then a minor, but who in July, 1861, obtained letters of administration to her father's estate. The plaintiffs continued the business of the father, who was a saddler, and in the course of this business they, in September, 1862, supplied to the defendant the goods in question.

The case was tried at Westminster before Bramwell, B., in Hilary Term last; and it then appeared, from the evidence of the husband, that the business was entirely carried on with money received by his wife from the intestate's estate, and that the goods in question were made of materials bought with money so received, all the old materials having been then used up.

Upon this it was objected, that the husband ought to have sued alone; and the learned judge acceded to the objection, and nonsuited the plaintiffs, reserving leave to move to enter a verdict for them for the amount found by the jury (73*l.* 10*s.*), the Court to have power to make any amendment which the judge might have made.

Holl, having obtained a rule accordingly,

Willoughby shewed cause. This was a new personal contract with the male plaintiff, on which he could have sued alone, the wife, so far as she was concerned, acting only as his agent. In

Edwards v. *Grace* (1), there was nothing to shew that the work and labour sued for by the plaintiff as administrator were not done by him in pursuance of a contract made by the intestate, as was the case in *Werner* v. *Humphreys* (2), where the coat, the price of which was sued for, had been tried on by the defendant before the intestate's death. An administrator has no right to carry on the intestate's business, except for the purpose of winding it up, and completing contracts made by the intestate; and if he does more, he is entitled to sue and liable to be sued, not in his representative, but in his personal capacity. His receipts are not assets in such a sense as to bring him within the rule laid down in 1 Will. Exors. 5th ed. p. 789; that "wherever the money recovered will be assets, the executor may sue for it, and declare in his representative character;" for although they may be assets in equity, in the sense that he is liable to account for them to creditors or next of kin, as in *Gibblett* v. *Read* (3), yet they are not such assets as are included in the "goods, chattels, or credits" which the deceased had "*whilst living*," and of which the letters of administration give the disposition to the administrator: see 1 Will. Exors. 5th ed. p. 392. These consist only in the property of the intestate—that is, his goods and his contractual rights, whether complete at the time of his death, or only inchoate, as in *Werner* v. *Humphreys* (2); and for these only can the administrator sue as such. The Court has no power to make the amendment asked for.

Holl, in support of the rule, relied upon the rule cited from 1 Will. Exors. 5th ed. p. 789, and upon *Cowell* v. *Watts*. (4)

The Court (Pollock, C.B., Martin, Bramwell, and Pigott, BB.) were clearly of opinion that the husband could only sue in his personal capacity. They further intimated a doubt whether they could amend; but the defendant having by his counsel offered the amount of the debt without costs, this offer was accepted on the part of the plaintiffs, and a *stet processus* was entered by consent.

Attorneys for plaintiffs: *Dod & Langstaffe.*
Attorneys for defendants: *Willoughby & Cox.*

(1) 2 M. & W. 190.
(2) 2 Man. & G. 853.
(3) 9 Mod. 459.
(4) 6 East, 405.

1866
April 21.

THE ATTORNEY-GENERAL *v.* UPTON AND OTHERS.

Succession duty—Power—Construction—16 & 17 *Vict. c.* 51, *ss.* 2, 4.

For the purpose of taxation under the Succession Duty Act (16 & 17 Vict. c. 51), the appointee under a general power of appointment, which has taken effect on a death happening, since the commencement of the act, takes a succession from the donee of the power.

Under the will of her husband, who died in 1856, a widow had a life estate in real property, with a general power of appointment by deed or will. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of testator's nephew, and of the children of the nephew by her, on trust for the separate use of the wife. Both the testator's nephew and his wife were strangers in blood to the testator's widow:—

Held, that under section 4 of the Succession Duty Act, the nephew's wife took the annuity as a succession from the testator's widow, and not from the testator himself, and that therefore a duty of 10 per cent. was payable.

Semble, per Bramwell, B., that the result would have been the same under section 2.

INFORMATION, claiming succession duty under the following circumstances:—Admiral Fanshawe, by his will, dated 14th of April, 1851, devised certain lands to the use of his wife, Caroline Fanshawe, for life, remainder to such uses as she should by deed or will appoint, and in default of appointment, to uses for the benefit of the testator's nephews, C. S. Fanshawe and J. F. Fanshawe, and their issue.

The testator died on the 9th of August, 1856; his wife survived him, and on the 3rd of August, 1858, by deed poll appointed the lands in question to the use, after her death, that the defendants A. T. Upton, R. B. Upton, and H. T. Jenkinson, and the survivors, &c., should, during the lives of Elizabeth Fanshawe, the wife of J. F. Fanshawe (the testator's nephew), and all and every the child or children of J. F. Fanshawe by Elizabeth Fanshawe, and the life of the longest liver, yearly receive an annuity of 200*l.*, free from deduction, to be charged on the same lands, and to be payable quarterly, the first payment to be made at the expiration of six calendar months after the death of Caroline Fanshawe, the appointor. The annuity was to be held on trust for Elizabeth Fanshawe during her life for her separate use.

Caroline Fanshawe died on the 12th of May, 1863, leaving

Elizabeth Fanshawe surviving, on whose behalf the defendants entered into receipt of the annuity.

The Crown claimed duty at the rate of 10 per cent., insisting that the predecessor was Caroline Fanshawe, who was a stranger in blood to both Elizabeth Fanshawe and her husband. The defendants, on the contrary, insisted that Elizabeth Fanshawe's interest was derived from Admiral Fanshawe, her husband's uncle, and that therefore only 3 per cent. was payable; and they also insisted that no duty was payable at all.

The Attorney-General, The Solicitor-General, Locke, Q.C., and *Pemberton,* for the Crown. The analogy of the Legacy Duty Act (36 Geo. 3, c. 52), to which the Succession Duty Act (16 & 17 Vict. c. 51) is a supplement, favours the construction contended for by the Crown, on both points. By s. 18 of the former act, where property is given for a limited interest with a general power of appointment, duty becomes payable on the execution of the power as if the property had been immediately given to the donee of the power, deducting what may have been already paid in respect of the limited interest; and by s. 7, any gift by will which has effect out of any personal estate which the testator has power to dispose of as he shall think fit, is to be deemed a legacy. Under these sections it was held in *Drake* v. *Attorney-General* (1), that on the execution of a general power, double duty was payable; one duty under s. 18, by the donee of the power, as for property given to him by the donor, another under s. 7 by the appointee, as for a legacy given to him by the donee. In *Attorney-General* v. *Brackenbury* (2), it was even held that appointees under a power of appointment, who were also the persons named to take in default of appointment, could not elect, but were bound to pay duty as upon a legacy taken from the donee. The functions of s. 4 and s. 2 of the Succession Duty Act, correspond respectively with those of s. 18 and s. 7 of the Legacy Duty Act. It may be conceded that in the case of powers not taking effect after the commencement of the act, and therefore, by the decision of the case of *In re Lovelace* (3), not within s. 4, the estate taken by an appointee

(1) 10 Cl. & Fin. 257. (2) 1 H. & C. 782; 32 L. J. (Ex.) 108.
(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.

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is by the rules of law to be considered as part of the original estate of the donor of the power, and not as derived from the donee. This seems to be admitted in *Attorney-General* v. *Gardner* (1), and also by Lord Cranworth in *Wallace* v. *Attorney-General* (2), where, in deciding that succession duty was not payable on property derived from a person of foreign domicile, he distinguishes the cases of *In re Lovelace* (3), and *In re Wallop's Trust* (4), on the ground that in those cases the property was appointed under a power, and was therefore to be taken as derived from the donor of the power, who was an Englishman, not from the donee, who was by domicile a foreigner. In *In re Barker* (5) the same doctrine was rather admitted than argued, and the opinion of Lord Kingsdown in *Lord Braybrooke* v. *Attorney-General* (6), is to the same effect. But granting this, the present case is not within the authority of those decisions or dicta; for all the cases cited were cases of powers taking effect before the commencement of the act, and were therefore left to the operation of s. 2, interpreted by the ordinary rules of legal phraseology. But the power here came into existence only on the testator's death in 1856, and as to powers taking effect since the act, s. 4 provides, that any person having a general power of appointment, "shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power." Caroline Fanshawe, therefore, by the exercise of her power, made this annuity of 200*l.* for purposes of taxation her property, and Elizabeth Fanshawe, taking it on her death, must be deemed to have derived it from her.

[MARTIN, B., referred to s. 33 of the Succession Duty Act.]

That section is only intended to do what, in the Legacy Duty Act, is effected by the words in s. 18, "after allowing any duty before paid in respect thereof." Duty on the limited interest is paid when that interest is taken, and that duty is afterwards deducted from the duty payable by the donee on the execution of

(1) 1 H. & C. 639; 32 L. J. (Ex.) 84.

(2) Law Rep. 1 Ch. App. at p. 9.

(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.

(4) 1 De G. J. & S. 656; 33 L. J. (Ch.) 351.

(5) 7 H. & N. 109; 30 L. J. (Ex.) 404.

(6) 9 H. L. C. 150.

the power, so far as the interest created by the power is identical with the limited interest.

Bovill, Q.C., for the defendants. First, no duty is payable at all; the case of *Drake* v. *Attorney-General* (1) is no authority, for the words of the Legacy Duty Act are clear; but a tax cannot be imposed merely by analogy to another statute, or by inference from inadequate expressions. Even if the opinion of Wood, V. C., in *In re Lovelace* (2) that s. 4 is the only section of the act touching successions under powers, is not correct, yet, in cases which do fall under s. 4, that is the only section applicable. Now it is agreed that this power is within s. 4, and according to the argument of the Attorney-General in *In re Barker* (3), no duty is payable, because the donee has not made an appointment in her own favour: but if that construction is unsound, still the section only makes the execution of the power operate to charge the donee in respect of the interest he creates, but does not touch the interest of the appointee. But, secondly, if any duty is payable, it is only on a succession taken from Admiral Fanshawe, the donor of the power. The operation of s. 4 is exhausted in making the donor of the power a successor, and any estate taken under the power is left to the operation of s. 2, as *In re Lovelace* (2) and *In re Barker* (4), and of the usual legal rules of construction. But how can the defendants be said to derive an interest from Caroline Fanshawe, in whom no estate, except a life estate, ever existed?

Hannen, on the same side. The rule is strict and technical that the appointee takes under the donor of the power, and to get rid of the operation of this rule a clear provision to the contrary must be shewn. It is admitted that the exercise of this power is within s. 4, but the question is, to what extent is it within it? It is within it to this extent, that the donee having exercised the power is to be deemed to have taken the appointed interest from the donor. But in this the whole object of that branch of the section which relates to general powers is accomplished. The object of the whole section was to shew, in respect of the donor of a power, who was to be deemed his successor; in the first branch it makes his successor the

(1) 10 Cl. & F. 257.
(2) 4 De G. & J. 340; 28 L. J. (Ch.) 489.
(3) 7 H. & N. at p. 113.
(4) 7 H. & N. 109; 30 L. J. (Ex.) 404.

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donee of a general power exercising it, who, as taking no legal interest in the property, would otherwise have paid no duty; in the second branch, it makes his successor any person taking under a power limited by the donor in favour of a class of which the appointee is a member. For the purpose, then, of taxing the donee of a general power, it deems him to be entitled to the interest appointed by him *as a succession;* but it gives him the property for no other purpose, and the use of the words *as a succession* shews that this is all the section contemplates. The case is therefore left to the 2nd section, and is the same as though the power had taken effect before the act; and the rule recognised by the Attorney-General in *In re Barker* (1) and *Attorney-General* v. *Floyer* (2), and which the Crown has found it for its interest hitherto to maintain, must govern.

The Attorney-General in reply. There is nothing in the act to favour the limited construction put upon s. 4 by the Attorney-General in *In re Barker*. (1) To support that construction, or the construction now suggested by the defendants, it would be necessary to introduce words into the section limiting the operation of the words used. Those words are apt, for without some transmitted property the idea of a succession does not arise; but when the act treats the donee as entitled to the property appointed, it inevitably follows that the appointee derives his interest from the person who is declared its owner.

POLLOCK, C.B. I am of opinion that the Crown is entitled to duty at the rate of 10 per cent. The case of *In re Barker* (1) was cited to the contrary, but the distinction pointed out by the Attorney General that the power there was created before the act, and was therefore (on the authority of *In re Lovelace* (3)) not within s. 4, shews that that case has no bearing on the present one. The act is remarkably well drawn, and shews a great knowledge of the subject matter to which it applies, and of the means of producing the results intended by its framers. The real property

(1) 7 H. & N. 109; 30 L. J. (Ex.) 404.]
(2) 9 H. L. C. 477; 31 L. J. (Ex.) 404.
(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.

law of this country is confessedly an extremely complicated system, and the peculiar difficulty which the act has to meet here is caused by the difference which the law recognises between an estate in fee, and an estate for life coupled with a general power of appointment. In substance the interest is the same, in power of enjoyment and in power of disposition; but there is a real distinction in the fact that the owner of a life-interest coupled with a power must, in order to secure the fee to his heirs, actually exercise the power; otherwise it will pass to those to whom it is limited in default of appointment. If, however, he does exercise the power, he is in substance doing the same thing as if he conveyed a fee vested in himself. The question to be decided is, from whom do the appointees under the deed executed by Mrs. Fanshawe derive their interest within the meaning of the act? and Mr. Bovill asks, how can they be said to derive from Mrs. Fanshawe an estate which according to the technical rules of law she never had? But the answer is, that having a life estate with a power to appoint the fee, she was entitled if she chose to take the one and leave the other. If she accepted and enjoyed only the life estate, that was the only interest on which she had to pay duty, the remainder went by the disposition of the testator; but if she chose to exercise the power, she then, by the words of s. 4, made it her property, and is to be considered to have taken an interest equal to the interest which she appointed. The duty then becomes payable under s. 2 on the appointed interest, as property derived from her; and although, if the case were left to the operation of s. 2, a duty of 3 per cent. only might perhaps be payable, by reason of the technical rule of law, which makes the estate of the appointee a part of the fee previously in the donor of the power, yet being brought within s. 4, that section operates to make the property property of the donee, and the succession a succession in which she is the predecessor.

MARTIN, B. I was at first inclined entirely to agree with the Attorney-General, but the argument of Mr. Hannen made considerable impression on me, and I am not clear that he is not right, though I am not so satisfied of it as to differ from the rest of the Court. If the matter stood only on s. 2, the appointee would, by the rule of law, be liable as taking from the settlor, but (the

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intervening third section relating to another matter) s. 4 may be read as coming immediately after s. 2, and it is contended that the whole ought to be taken together as providing that in the case of general powers, to which the first part of the fourth section applies, the donee of the power exercising it shall be considered a predecessor of the interest which he appoints, or that, in other words, the statute creates in the donee of the power for the purposes of taxation an interest equal to the whole interest which is given by him to the person taking under the power. I cannot say that this is an unreasonable construction, although I was struck with the contrary argument. With respect to *In re Barker* (1), I remember that on that occasion the matter was scarcely discussed, but the amount of 3 per cent. being conceded by the counsel for the defendants, more was not claimed on behalf of the Crown.

BRAMWELL, B. I also think that the Crown is entitled to judgment for duty at the rate of 10 per cent., and in my opinion the case is very clear. I am not concerned to maintain my opinion in *In re Barker* (1) (though I think it was right), for I did not then understand the distinction on which the Attorney-General now relies; but in the present case, either under s. 2 or under s. 4, the Crown is entitled to the duty claimed. It is conceded that the objection is a purely technical one, and that if the estate had been devised to Mrs. Fanshawe in fee, and she had then granted or devised the annuity to the defendants, duty at the rate claimed by the Crown would have been payable at her death; but it is contended that this difference in the form of the devise makes a difference in the duty payable. But we must remember, as was said by Lord Campbell in *Lord Saltoun's* case (2), and in *Braybrooke* v. *Attorney-General* (3), that this act extends to Scotland as well as to England, and that, to use his words, the question is, whether "in popular language, and substantially," the defendants derive an interest from Caroline Fanshawe. Now, it is said that as a matter of legal technical expression, the appointee takes under the donor, not under the donee of the power, and if it is necessary to construe the act by these rules, we must yield to the argument for the defendants. But in s. 2 the words are not technical; that

(1) 7 H. & N. 109; 30 L. J. (Ex.) 404. (2) 3 Macq. 659; 7 H. & N. at p. 116.
(3) 9 H. L. C. 150.

section provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . . shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition . . . a succession." Now, will these annuitants take *by reason* of the will of Admiral Fanshawe? We must look, not at the causa remota, but at the causa proxima, and that is the disposition of Caroline Fanshawe. Again, the act says that the term predecessor "shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." From whom then is the interest derived? As I said in *Barker's* case (1), these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fanshawe, or from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law, that an appointee takes his estate from the donor of the power; but I say that it is a rule not applicable to the construction of this statute; and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary.

But if I am wrong in this, the Crown is inevitably entitled under s. 4; for, though I appreciate the argument which was very clearly put by Mr. Hannen, that the object of the section was to determine when the donee of a power was, and when he was not, to be considered successor to the donor, and that the words must be interpreted with reference to this governing intention, yet when it is said that the donee of a power "shall be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed," it follows that from that time he is made a new terminus of succession. Suppose a devise to A. for life, with a general power of appointment to B., who appoints to himself for life, remainder to C. in fee: from whom does C.'s interest come? Not from the testator, because by the very words of the statute B. has already been made successor to him as to the whole fee, after A.'s life estate. It must then be from B., who is taken by the exercise of the power to have acquired the fee as his own.

(1) 7 H. & N. at p. 116.

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PIGOTT, B. I also think that upon the construction of ss. 2 and 4, read together, the Crown is entitled to a 10 per cent. duty. Probably if s. 2 stood alone it would be otherwise; but it is unnecessary to discuss this, for in my judgment s. 4 clearly gives to the donee of the power an interest in the estate appointed. On the exercise of the power the section creates an interest in the donee, and having once vested that estate in her without any qualification, it must be taken to be hers for all purposes of taxation, and to be transmitted from her to the defendants. Then from whom is the succession derived? It must be from her, and to hold otherwise would be inconsistent with the words of the statute, and would require us to import qualifying words into the section which are not there. I cannot see anything which should induce us to depart from the ordinary meaning of the words, which follows the substance of the transaction.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for defendants: *Upton, Johnson, & Upton.*

April 23.

BLUMBERG AND ANOTHER *v.* ROSE AND ANOTHER.

Debtor and Creditor—Bankruptcy—Deed of Arrangement—Assenting and Non-assenting Creditors—Inequality.

To an action on a bill of exchange the defendants pleaded a composition deed, entered into between themselves, a trustee, and the several persons whose names were set forth in the schedule to the deed annexed, whereby it was provided that the scheduled creditors should each receive three promissory notes payable at different dates, to secure the payment of the composition agreed on, and that the trustee should receive and hold similar promissory notes to be handed upon demand to non-assenting creditors, amongst whom were the plaintiffs. There was no provision requiring a tender of these notes to be made to non-assenting creditors:—

Held, that although there was some practical inequality in the position of the creditors named in the schedule, and of the non-assenting creditors, there was no such inequality as vitiated the deed.

DECLARATION on a bill of exchange drawn by the plaintiffs and accepted by the defendants, and for money payable on accounts stated.

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Plea, That after the accruing of the causes of action in the declaration mentioned, the defendants being indebted to the plaintiffs and to divers other persons, a deed was entered into between the defendants and their creditors and a trustee in the words following:—

This indenture, made .... between George Rose and James Rose (the defendants), hereinafter styled "debtors," of the first part; Samuel Davis, hereinafter styled the "trustee," of the second part; and the several persons whose names or firms are set forth in the schedule hereto annexed, hereinafter styled "creditors," of the third part; whereas the said debtors, being unable to meet their engagements with their creditors, have proposed to pay them a composition of twelve shillings and sixpence in the pound, by giving them respectively three joint and several promissory notes payable at six, nine, and twelve months from the date hereof; .... which said several promissory notes the creditors have agreed to take in full satisfaction and discharge of their respective debts; and whereas the said composition to be secured by the said promissory notes is payable to creditors who have not assented to these presents, and such promissory notes have been deposited with the said trustee, to be held by him in trust to deliver the same respectively to such last-mentioned creditors respectively on demand as the said trustee doth hereby acknowledge; now this indenture witnesseth, that, in consideration of the premises, each of the said creditors who shall have executed or otherwise assented to, or who shall be bound by these presents, for himself and his partners, &c., doth hereby release the said debtors, their heirs, &c., from all debts due and owing by the said debtors to such creditors. (Then followed several further clauses immaterial to the present decision.) Averments of the due execution and registration of the deed as required by the Bankruptcy Act, 1861; that the plaintiffs were creditors of the defendants in respect of the debt sued for, and all things, &c., having been performed, that they became and were bound by the said deed as if they were parties thereto; that the said promissory notes were deposited with the said trustee, and all things done necessary to make the said deed operate as a valid release of the said debts of the plaintiffs.

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Demurrer and joinder.

Holl, in support of the demurrer. The deed pleaded is invalid. There is an inequality between the plaintiffs, who are non-assenting creditors, and the scheduled creditors who have assented. The latter get the notes securing their composition handed over to them directly, while the non-assenting creditors are obliged to demand their notes of the trustee.

[BRAMWELL, B. Does the principle that inequality vitiates a deed apply where the debtor does the best he can for non-assenting creditors, but something more for those who assent?]

Here the debtor has not done the best he could. A clause should have been inserted in the deed requiring a tender of the notes to be made to non-assenting creditors. Without such a provision they have no notice that the notes are deposited with the trustee to secure their composition.

Joyce, contrà, was not called upon.

POLLOCK, C.B. I am of opinion that our judgment should be for the defendants. It seems to me clear that this deed does not contain that kind of inequality which is contemplated by the statute. It is impossible where there are two sets of creditors, one assenting, the other non-assenting, but that there should be some degree of practical inequality. But to a deed equal in principle inequality in effect is no objection.

MARTIN, B. I am of the same opinion. This sort of inequality is, I think, necessarily incident to the position of a non-assenting creditor, and, moreover, there is nothing in the act compelling the debtors to do what it is argued in this case it was their duty to do.

BRAMWELL, B. I am of the same opinion. It may be that in such a case as this the non-assenting creditor is in a worse position than the assenting creditor. But the inequality seems to me to be only that sort of inequality which the statute contemplates. There is not a word in the statute requiring every creditor to have notice of the contents of a deed, or to give creditors an opportunity of considering whether or no they will accept the proffered composition. Perhaps it would be well if there were some such

provision, but there is none, and therefore under the statute we are bound to hold this deed good. 1866

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PIGOTT, B., concurred.

Judgment for the defendants.

Attorneys for plaintiffs: *Dodd & Longstaffe.*
Attorney for defendants: *J. T. Miller.*

MANNING *v.* TAYLOR AND OTHERS. *April* 25.

Will—Devise—Gift of fee-simple without words of limitation.

By a will dated before the Wills Act (1 Vic. c. 26), the testator, who had purchased two undivided fourth parts of certain lands, previously held in quarters, devised to J. M., without words of limitation, "all my undivided quarter of three fields," describing them as then on lease for three lives:—

Held, that the devise carried the fee.

SPECIAL case in an action of ejectment brought for the recovery of an undivided fourth part of certain lands called Castle Hayes.

In 1799, one John Hellyer purchased two fourth parts of Castle Hayes, which had been previously held in undivided fourths. By his will, dated 23rd of April, 1801, he devised as follows:—"I give unto Joseph Manning, son of my daughter, Elizabeth Manning, all my undivided quarter of three fields, in the parish of Plympton Maurice, and are at lease to Miss E. Palmer on three lives; conventionary rent, 13*s.* 4*d.*; heriot, 10*s.* 4*d.*, on each life dying; known and commonly called Castle Hayes, to be received by the said Joseph Manning, or his father for him."

He had previously devised his other "undivided quarter" to his daughter, Mary Lane, for life, and after her death to her son, Joseph Lane, without words of limitation.

After giving legacies to John Lane, husband of his daughter Mary, and Richard Manning, husband of his daughter Elizabeth, he proceeded: "I appoint you, the said J. Lane and R. Manning, immediately after my death, to receive the rents of all I have given your children, as it shall come into hand, and to keep the house [the subject of a devise to J. Manning] in good repair, and to pay for their schooling, clothing, and binding them apprentice;

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to keep a just account, and, as they attain each of them their full age of twenty-one years, to pay to each of them the money due." And he appointed them executors.

The will contained many devises, in several of which the *fee* was given by that word. Amongst the devises was one of "my moiety" of Clawland to R. M.; and another of "the fee of my moiety of Wedgers Parks, immediately after the death of the lives now on it," to John M.

The testator died in 1802. Joseph Manning entered into possession of the lands devised to him, and died in 1846, having by his will, dated the same year, devised all his real and personal estate to his wife Mary absolutely. After his death, persons claiming to be the heirs-at-law of the testator, and under whom the defendants claim, took possession of the lands, which they retained till the death of Joseph Manning's widow in 1864. In that year, the plaintiff, who was the only son of Joseph and Mary Manning, and her heir, commenced this action; and the question for the Court was whether, under the devise above set out, Joseph Manning took an estate in fee, or an estate for life. If the former, the judgment was to be for the plaintiff; if the latter, for the defendants.

Joshua Williams, Q.C. (*Anstie* with him), for the plaintiff. The devise of an "undivided quarter" gives the fee without words of limitation; the word "quarter" being understood to refer, not to the material object of the devise, but to the testator's estate in it, by a rule similar to that which makes the word "estate" carry the fee, though coupled with a word of local description: *Phillips* v. *Allen.* (1) In *Bebb* v. *Penoyre* (2), Lord Ellenborough would have held, if it had been necessary so to decide, that the word "share" carried the fee, and the Court of King's Bench did so decide in *Paris* v. *Miller.* (3) In the latter case, Lord Ellenborough relies upon the fact that what the testator gave was held by him as a share, and was not a portion carved out by himself; and that remark is applicable to the present case. The cases of *Montgomery* v. *Montgomery* (4) and *Green* v. *Marsden* (5) are to the same effect. Following these

(1) 7 Sim. 446, 457, 467. (2) 11 East. 160. (3) 5 M. & S. 408.
(4) 3 Jones & Lat. 47, 61. (5) 1 Drew. 646, 653.

cases, the Court of Common Pleas, in *Doe* v. *Fawcett* (1), held that a gift of "my moiety" carried the fee, and that case is in substance indistinguishable from the present. The words at the end of the devise are explained by the concluding words of the will. That the testator elsewhere gives the *fee* does not prevent the word quarter from having its proper operation, as is shewn by the cases of *Ibbetson* v. *Beckwith* (2) and *Uthwatt* v. *Bryant* (3), where the same argument was not allowed to control the effect of the word "estate." He referred to Jarm. Wills, vol. ii., p. 257 (3rd ed.).

Mellish, Q.C. (*Lopes* with him), for the defendants. The word quarter is a word of ambiguous signification, and must be interpreted by the context: the concluding words of the devise, the gift elsewhere of the fee by proper words, especially in connection with the word *moiety*, and the reference to the rent, all shew that a life estate only was intended to be given to Joseph Manning. The remarks of Lord Ellenborough in *Paris* v. *Miller* (4) are applicable in favour of the defendants, because the testator, by the purchase of the two quarters, became seised of a moiety; and his devise of this moiety by quarters is a "carving out of shares." He cited *Fawcet's* case. (5)

Joshua Williams, Q.C., in reply, was stopped.

MARTIN, B. Our judgment must be for the plaintiff. Mr. Jarman (Wills, vol. ii., p. 247, 3rd ed.), after stating the rule that a gift of land without words of inheritance only confers an estate for life, which he describes as a "rule of construction entirely technical" (p. 248), and after enumerating various exceptions to it, and stating the alteration made by the Wills Act (1 Vict. c. 26, s. 28), adds (p. 266) that "the restricted construction rarely accords with the actual intention of the testator." The Courts, seeing this, before the statute seized on everything that could enable them to distinguish a devise without words of limitation from a simple devise of lands, and gave to certain particular words the effect of carrying the fee, by referring them exclusively to the testator's legal interest. There is nothing in this will that throws any light

(1) 3 C. B. 274. (2) Cas. t. Tal. 157. (3) 6 Taunt. 317.
(4) 5 M. & S. 408. (5) 8 Vin. Ab. Devise L. a. pl. 11.

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on the testator's intention, beyond the clause containing the devise in question; but something may be said as to the character of the subject of devise. It was a reversion of two-fourths of three fields, expectant on the determination of a lease for lives; and, bearing this in mind, we may infer that when the testator devised this undivided quarter, he must have meant to refer, not to the land, which was not in his actual possession, but to his reversion in it —that is, to his legal estate or interest. If he had used the word reversion, this would have been clearly so, and substantially he has done the same thing. Therefore, even without the case in the Common Pleas, I should have come to the conclusion that this devise would have passed the fee; but it is impossible to distinguish the word "moiety" from the words "undivided quarter" for this purpose; and if one carries a fee, so must the other. The only explanation of the matter is that the Courts at first established an arbitrary rule in favour of the heir, and afterwards established an arbitrary exception to that rule in favour of the intention of the testator.

BRAMWELL, B. I entirely agree. Apart from authority, I should have been of the same opinion: the final clause is fully explained by the fact that the land was on lease, and that the devisee was a minor; and the testator's intention is clear. But the case cited is entirely in point, and concludes the matter.

PIGOTT, B. I also think that the case cited is conclusive, and am glad to follow it.

Judgment for plaintiff.

Attorneys for plaintiff: *Vizard & Anstie.*

Attorneys for defendants: *Surr & Gribble.*

MANGAN *v.* ATTERTON.

1866
April 30.

Negligence—Dangerous Instrument—Public Place.

66 B. 405

The defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed:—

Held, that the plaintiff could not maintain any action for the injury.

APPEAL from the Staffordshire County Court at Lichfield.

The plaintiff sued for injury caused to him by a machine of the defendant, under the following circumstances. The defendant, who is a whitesmith at Sheffield, was accustomed on market days to expose goods for sale in the public street; and on the day of the accident he exposed amongst them a machine for crushing oil-cake, unfenced and without superintendence. The machine was turned by a handle on one side of it, and on the other side the cogs which worked the crushing rollers were exposed; the handle might have been, but was not, secured by wire. The plaintiff, a boy of four years old, was coming past the machine from school, in company with his brother, of the age of seven years (to whose charge his mother had entrusted him), and with other lads; and whilst one of the lads was turning the handle, the plaintiff, by the direction of his brother, put his fingers in the cogs, which so crushed them as to make their amputation necessary.

The county court judge directed the jury that if they thought the machine was dangerous, and one that should not have been left unguarded in the way of ignorant people, and especially children, without, at all events, the handle being removed or fastened up and the cogs thrown out of gear, they should hold the defendant liable for such damages as they might think right.

The jury inspected the machine, and gave a verdict for the plaintiff, damages 10*l*. The defendant appealed.

Macnamara, for the defendant, contended that there was no

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evidence of negligence on his part, and that the boy's own act was the cause of the accident, and cited *Hughes* v. *McFie.* (1)

Staveley Hill, for the plaintiff, distinguished that case from the present, on the ground that there the boys were joint actors, but the plaintiff here acted under the direction of his brother, and was, from his extreme youth, no more accountable for his actions than a person blown against the machine.

Macnamara was not called on to reply.

MARTIN, B. Even if the defendant was guilty of any negligence in placing the machine where it was, as to which I say nothing, his act was too remote a cause of the mischief to make him liable. The accident was directly caused by the act of the boy himself.

BRAMWELL, B. The defendant is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? This shews that it is impossible to hold the defendant liable. But further, I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree.

PIGOTT, B., concurred.

Judgment for the defendant.

Attorney for plaintiff: *Thistlethwaite.*
Attorneys for defendant: *J. & C. Cole.*

(1) 2 H. & C. 744; 33 L. J. (Ex.) 177.

KRAMER *v.* WAYMARK.

1866
May 1.

Practice—Death of plaintiff between verdict and judgment—New trial—Stay of proceedings—17 *Car.* 2, *c.* 8, *s.* 1—15 & 16 *Vict. c.* 76 (*C. L. P. Act*, 1852), *s.* 139.

An action for negligence was brought by the plaintiff, a child of seven years old, by his next friend, to recover damages for injuries done to him by the horse of the defendant. The jury found a verdict for 150*l.* Nine days after the trial the child died. Judgment was afterwards signed by the next friend. An application to stay proceedings, or for a new trial, was then made on the ground of the death of the plaintiff since the trial:—

Held, first, that although the damages were presumably given on the supposition that the child would continue to live, the case was not one in which the Court would grant a new trial; secondly, that the death of an infant plaintiff in an action for negligence between verdict and the signing of judgment was no ground for a stay of proceedings, if judgment had been signed within the time specified in 17 Car. 2, c. 8, s. 1, and the C. L. P. Act, 1852, s. 139.

Palmer v. *Cohen*, 2 B. & Ad. 966, followed.

THIS was an action for negligence, brought on behalf of a child of seven years old, by his next friend, to recover damages for injuries sustained by the child from a kick of one of the defendant's horses. The defendant pleaded not guilty. At the trial before Erle, C.J., at the last Surrey Spring Assizes, it was proved that the injuries, which were to the eye, skull, and brain, were very severe, that they had entailed acute suffering on the plaintiff, and that their effect would probably be to incapacitate him from ever obtaining a living in the ordinary way. He had been in the Royal Free Hospital from the 4th of July, 1865, the day of the accident, to the 14th of October, 1865, and from that time to the 28th of March last, the day of the trial, continued an out-patient. Under these circumstances, and the negligence of the defendant having been proved to their satisfaction, the jury found a verdict for the plaintiff, damages 150*l.* Nine days after the trial, and before judgment was signed, the child died. Judgment was afterwards signed by the next friend.

The 17 Car. 2, c. 8, s. 1, enacts that "in all actions personal, real, or mixed, the death of either party between the verdict and judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict."

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The 15 & 16 Vict. c. 76 (C. L. P. Act, 1852), s. 139, enacts that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error so as such judgment be entered within two terms after such verdict."

A rule nisi was obtained (April 18) calling on the plaintiff to shew cause why, on payment by the defendant of the costs of the trial, and costs since incurred in this action, all further proceedings should not be stayed, or why the verdict for the plaintiff and the judgment signed thereon should not be set aside, and a new trial had, on the ground of the death of the plaintiff since the trial and before judgment signed.

May 1. *Murphy* shewed cause. First, judgment has been signed within the time specified by the 17 Car. 2, c. 8, s. 1, and the 15 & 16 Vict. c. 76, s. 139. Those enactments apply to all actions, whether the right of action survives to the representatives of the deceased or not; *Palmer* v. *Cohen* (1), which, however, conflicts with *Ireland* v. *Champneys*. (2)

[BRAMWELL, B. In any event we ought not to stay proceedings, for, if anything, this objection is ground of error.]

It cannot be alleged for error if judgment is signed, as in this case, within two terms after verdict. Secondly, the death of the plaintiff is no ground for a new trial. The damages might, perhaps, have been different had the jury assessed them with a belief that he would speedily die, but they cannot be called excessive.

[BRAMWELL, B. The jury gave damages on the assumption that the plaintiff would live and suffer.]

There is nothing to shew that they would in any event have given less. Moreover, damages at a trial are assessed once for all and cannot be affected by subsequent events.

M. Chambers, Q.C. (*Ribton* and *Beasley* with him), in support of the rule. The case is not within the statutes referred to. The next friend has no right to proceed, his authority, like that of an attorney, being determined by death: Bac. Abr. Tit. Attorney (E.); *Palmer* v. *Reiffenstein* (3); *Shoman* v. *Allen*. (4) In *Flinn* v. *Perkins* (5) it was held that a suggestion of the death of a plaintiff

(1) 2 B. & Ad. 966. (2) 4 Taunt. 884. (3) 1 Man. & G. 94.
(4) 1 Man. & G. 96 (n). (5) 32 L. J. (Q.B.) 10.

could not be entered under s. 137 of the Common Law Procedure Act, 1852, except where the cause of action survived; and the same rule applies under s. 139 as to signing judgment. In neither section are there any words of limitation. Secondly, it would be unjust, the child having died, to make the defendant pay the damages awarded. The Court can prevent that injustice by granting a new trial: *Griffith* v. *Williams*. (1)

MARTIN, B. I am of opinion that this rule should be discharged. It was obtained on two grounds [the learned judge read the terms of the rule]. As to the first, we think that the proceedings are regular and should not be stayed. The question depends upon the Common Law Procedure Act, 1852, s. 139, and on the 17 Car. 2, c. 8, s. 1. The latter statute provides that "in all actions personal, real, or mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." In the former statute, there being but few real or mixed actions left, the same enactment is put generally. I am unable to account for the construction put upon the statute of Charles in *Ireland* v. *Champneys* (2); but in *Palmer* v. *Cohen* (3) the same point arose again, and the Court of Queen's Bench decided, as I think rightly, that the words of that statute are express and admit of no doubt. I therefore think that the proceedings here have been regular.

With regard to the second point, that the damages are excessive, I think upon the whole that we ought to let the matter rest, and not grant a new trial.

BRAMWELL, B. I am of the same opinion. As to the latter point, no doubt there is some hardship incurred; but we may remember this, that if the child had died before the commission

(1) 1 C. & J. 47.

(2) 4 Taunt. 884. By 8 & 9 Will. 3, c. 11, s. 6, it is enacted that actions are not to abate if the plaintiff or defendant happen to die after *interlocutory* and before final judgment, *if* such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying. In *Ireland* v. *Champneys*, the action was for a libel, and the plaintiff died *after interlocutory judgment* and writ of inquiry executed. It was held that final judgment could not be entered, the suit having abated by his death, and not being one which could have been brought by his representatives. See 2 Wms. Saund. pp. 72 n & 72 p.

(3) 2 B. & Ad. 966.

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day at Kingston, no damages would have been recoverable. If, on the other hand, it had outlived the first four days of this term, there could have been no such application as that now made to us. Under these circumstances, though we could interfere, I do not think we ought to do so. With regard to the first point, even assuming the defendant's contention to be right, he must bring error, for we could not stay proceedings in face of the case of *Palmer* v. *Cohen*. (1) But in fact the case under the Common Law Procedure Act, 1852, s. 139, is stronger against him than under the statute of Car. 2. Section 139 contains no such words of limitation as the surrounding sections [ss. 138, 140]. It would seem, therefore, to apply to all actions, whether they would have survived to an executor or not.

PIGOTT, B. I am of the same opinion. The words of s. 139 of the Common Law Procedure Act, 1852, are quite general, and include this case. I also think that this is not a case where we should grant a new trial.

Rule discharged.

Attorney for plaintiff: *W. T. Ricketts.*
Attorney for defendant: *T. Binns.*

May 3.

RAYMOND *v.* MINTON.

Apprentice—Independent Covenants—Condition Precedent.

To an action of covenant against the master for not teaching his apprentice, it is a good plea that the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him.

DECLARATION on a covenant by the defendant, contained in an indenture of apprenticeship of 18th Feb., 1864, by which the defendant covenanted to teach H. Page, the plaintiff's son-in-law, in the art, trade, or business of a builder, ornamental painter, and decorator, and to find him food, &c., during the five years of his apprenticeship, for a premium of 29*l.*, averring that the defendant did not nor would, during the term, or the part of it already elapsed, teach the apprentice in the said art, &c., but wholly failed, neglected, and refused so to do; and did not nor would find him food, &c.

(1) 2 B. & Ad. 966.

Third plea, as to the alleged breach in not teaching the apprentice, that at the time of the said alleged breach the apprentice would not be taught, and by his own wilful acts hindered and prevented the defendant teaching him in the said art, &c., and then, by his said acts, caused the breach pleaded to.

Demurrer and joinder.

Goddard, in support of the demurrer. The covenants in an apprenticeship deed are independent, and the non-performance of his duty by the apprentice may give a right of action to the master, but does not discharge him from the obligation to perform his own duty, *Winstone* v. *Linn* (1); on the contrary it is the master's duty to make the apprentice obey and learn, and he has the power by law to compel obedience: per Watson, B., in *Phillips* v. *Clift*. (2) The contract is one of a peculiarly personal kind, and of great mutual trust, and its difference from the ordinary one of master and servant is illustrated by the case last cited, where the dishonesty of the apprentice was held not to form any answer to an action against the master for not fulfilling his side of the contract. This plea may only mean that the apprentice is idle.

[MARTIN, B., referred to *Mercer* v. *Whall*. (3)]

If it is contended that the apprentice's obedience is a condition precedent to the master's performance of his duty, independently of the covenants in the deed, the covenant in the deed for his obedience becomes superfluous.

Grantham, in support of the plea, cited *Hughes* v. *Humphreys* (4), and pointed out that in both the cases relied on for the plaintiff, the action was brought for a total refusal to instruct the apprentice, which was not alleged here.

POLLOCK, C.B. It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught, and the plea sufficiently shews that to be the case.

MARTIN, B. The master contracts to teach the apprentice by the best means in his power, and common sense points out that, if the apprentice will not be taught, the master cannot teach him by

(1) 1 B. & C. 460.
(2) 4 H. & N. 168; 28 L. J. (Ex.) 153.
(3) 5 Q. B. 447.
(4) 6 B. & C. 680.

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any means. The willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him. Reduce the matter to a particular instance, and this becomes apparent. The master says to the apprentice, "Get up on that ladder and I will teach you the business of a house decorator;" the apprentice refuses, and stands upon the floor; it is obvious that the cause of the apprentice not being taught is that he has made it impossible, and the master cannot be called upon to perform an impossibility. (1)

BRAMWELL and PIGOTT, BB., concurred.

Judgment for the defendant.

Attorney for plaintiff: *R. S. Taylor.*

Attorney for defendant: *W. T. Ricketts.*

May 3

CAVELL AND ANOTHER *v.* PRINCE.

Covenant—Nullity of Marriage—Impotence.

To an action on a covenant made by the defendant in consideration of his daughter's marriage, the defendant pleaded that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any court, or that either of the parties had elected to treat it as void:—

Held, a bad plea.

DECLARATION on a covenant, by which the defendant covenanted with the plaintiffs to pay an annuity of 200*l.* to one I. if a marriage should be solemnized between him and the defendant's daughter, averring that the marriage was solemnized, and that 200*l.* was due on account of the annuity.

Fourth plea, on equitable grounds, that the deed was made with plaintiffs as trustees for I., in consideration of the marriage of I. with the defendant's daughter, and of such marriage being valid, and of I.'s being competent to contract the marriage, averring that in fact the marriage was not valid, and that I. was not competent to contract the same, but the marriage was always null and void by reason of the impotence of I., of which the defendant had

(1) Vide *Ellen* v. *Topp*; 6 Ex. 424; 20 L. J. (Ex.) 241.

no notice at the time of making the deed; and that the defendant's daughter had never been able to live and cohabit with I. by reason of his impotence, and had never lived and cohabited with him for the reason aforesaid, and the consideration for making the said deed wholly failed as aforesaid.

Demurrer and joinder.

The plaintiffs' points for argument on this demurrer were in substance as follows: That impotence existing in either party at the time of the solemnization of a marriage duly solemnized, is not a civil but a canonical disability to his or her entering into the marriage contract; that such disability renders such marriage voidable only, and not ipso facto void, and that such marriage can only be made void by the declaration of a sentence of nullity against it by the Court for Divorce and Matrimonial Causes, given during the life of both the parties. That, assuming a question of nullity of marriage to be cognizable in any court other than that for Divorce and Matrimonial Causes, the validity of a marriage duly solemnized cannot be questioned on the ground of the impotence of one of the parties thereto, by any person except the other party thereto. That the plea did not aver that the impotence of the man was permanent and incurable, nor that the woman was virgo intacta et apta viro.

Keane, Q.C. (*Haselfoot* with him), in support of the demurrer cited Boehmerus. Princip. Juris. Canon. s. 346, and *B——n* v. *B——n*. (1)

Beresford, in support of the plea, cited *H——* v. *C——* (2), but admitted that the plea was destitute of authority.

The Court (POLLOCK, C.B., MARTIN, BRAMWELL, and PIGOTT, BB.) inclined to the opinion that such marriages were, in the words of Bramwell, B., in *H——* v. *C——* (3), "valid at common law, unless avoided—null by the law ecclesiastical"; but they held that it was unnecessary to decide that point, for that whether, as between the parties to them, such marriages could or could not be treated as absolutely null and void, it was certainly not open to

(1) 1 Spinks, 248. (2) 1 Sw. & Tr. 605; 29 L. J. (P. M. & A.) 81.
(3) 1 Sw. & Tr. 622; 29 L. J. (P. M. & A.) at p. 92.

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a third person to make the objection, when neither of the parties concerned had done any act to raise the question, or to signify an election to treat the contract as void.

Judgment for the plaintiffs.

Attorney for plaintiffs: *E. Cavell.*
Attorneys for defendant: *Lewis & Lewis.*

May 8.

COOMBES *v.* DIBBLE.

Contract—Illegality—Wager—Horse Race—Contribution to Prize—8 & 9 *Vict. c.* 109, *s.* 18.

The plaintiff and defendant agreed to ride a race each on his own horse, both the horses ridden to become the property of the winner:—

Held, that the horses could not be regarded as a contribution toward a prize within the meaning of the proviso in 8 & 9 Vict. c. 109, s. 18, and that the contract was therefore void under that section, as being "by way of gaming or wagering."

Plaintiff's

DETINUE for the ~~defendant's~~ horse.

Pleas, non-detinet and traverse of the plaintiff's possession of the horse. Issues thereon.

At the trial before Byles, J., at the last Somersetshire Spring Assizes, it appeared that the plaintiff and the defendant agreed to ride a race, each on his own horse, the winner to become possessor of both horses. The race was accordingly run upon those terms, and won by the defendant. Shortly afterwards he took possession of the horse which had been ridden by the plaintiff. Upon these facts the learned judge directed a verdict for the defendant, leave being reserved to move to enter a verdict for the plaintiff for 14*l.*, upon the ground that the agreement was void, and that no property in the horse passed to the defendant under the agreement.

The 8 & 9 Vict. c. 109, s. 18, enacts that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won on any

wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, provided always that this enactment shall not be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

A rule nisi was obtained (April 24) pursuant to leave reserved.

May 8. *Edlin* shewed cause. A horse race is a lawful game: *Evans* v. *Pratt* (1); and this agreement is therefore within the proviso of section 18, being, in effect, an agreement to contribute both horses towards a prize to be given to the winner of the race. It is not a contract, "by way of wagering," although it may be difficult to distinguish it from such a contract, there being only two contributors; but whether there are two subscribers or fifty is immaterial. *Batty* v. *Marriott* (2) is in point. There Cresswell, J., says (p. 832), that "a contribution to sweepstakes is clearly a wager, but by the proviso the prohibition or disqualification is not to apply to any subscription or contribution towards any plate or sum to be awarded to the winner of any lawful game."

[MARTIN, B. Except for the express words used by Cresswell, J., I should have thought the proviso would not have covered a contribution to sweepstakes.

POLLOCK, C.B. The statute speaks of a contribution for or toward a prize. I think that means a money contribution.]

There is nothing to prevent chattels which themselves form the prize from being contributed.

Prideaux, in support of the rule, was not called on.

POLLOCK, C.B. Upon the point which has been argued before us my opinion is clear. The question arises as follows:—Two men, each of them possessed of a horse, agreed to ride a race, each on his own horse, the winner to have both horses. That is the whole transaction; there is no deposit of anything with a stakeholder, but the owners simply agree together that they will ride the race, and that the successful rider shall keep both horses.

(1) 3 M. & G. 759. (2) 5 C. B. 818; 17 L. J. (C.P.) 215.

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Now it has been contended on these facts, that there has been a contribution by each, or an agreement to contribute, for or toward a "plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise;" but I am of opinion that, unless a forced construction be adopted, no one could reasonably come to that conclusion. It is impossible to dissociate the view to be taken of an act of parliament from the essential circumstances connected with the subject matter of the act. Now I do not say that by no possibility could any one—affixing their ordinary meaning to the words—come to the conclusion contended for, but I should be much surprised if any one connected with the usages of horse racing should do so. Moreover such a construction confounds barter with sale. The act, I think, refers only to cases of actual money subscriptions. It may be, however, that if some *thing*, not money, were sent to a stakeholder, that would be a "subscription" within the meaning of the proviso. But to say that the two horses which run the race are a "contribution" toward the prize to be run for, is to extend the act to a case which I feel sure never was contemplated.

MARTIN, B. I am of opinion that this case falls within the first part of 8 & 9 Vict. c. 109, s. 18. The enactment is, that all contracts or agreements, whether by parol or in writing, "by way of gaming or wagering," shall be null and void. This is a contract, and I think a wager, in the ordinary sense of the word, that one horse should beat the other, to which was added a condition that the winner should have both horses. The section proceeds to enact that no suit shall be brought in any court of law or equity, to recover any sum of money or "valuable thing" alleged to be won in any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made. Now a horse is "a valuable thing," and if it, or the sum of 14*l.*, had been in the hands of a stakeholder, I do not think it could have been recovered. Then comes the proviso, that the enactment is not to apply "to any subscription, or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money," to be awarded to the winner of any lawful game. I think there was no subscription or contribution here. The horse of the loser was

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to become the property of the winner, and that was a void contract. If the case came within the principles laid down in *Batty* v. *Marriott* (1), I should feel bound by that authority. But inasmuch as it does not fall under the terms of the proviso, it does not come within the decision in that case.

BRAMWELL, B. I am of the same opinion. It is clear that this case is within the first part of section 18. With regard to the proviso, I do not myself disagree with the decision in *Batty* v. *Marriott* (1); but this case is not within the proviso, and therefore not touched by that case. I do not say but that there may be a "prize" of such a thing as a horse, but in this case there was, in my opinion, no "contribution or subscription," nor any agreement to contribute or subscribe within the meaning of the proviso. The plaintiff was not to contribute his horse if he won, nor was the defendant if he won. I do not think the legislature could ever have meant to include such a case as this under the terms of the proviso. That being so, I must decide this question in the plaintiff's favour.

Rule absolute.

Attorneys for plaintiff: *Purkis & Perry.*
Attorney for defendant: *J. F. Holmes.*

In re WHITWORTH *v.* HULSE. *May* 3.

Arbitration — Award — Insufficiency.

It is no objection to an award that the arbitrator has not found each matter referred to him separately, unless from the submission it is clear that the intention of the parties was that he should so find.

MOTION to set aside an award, or to refer it back to the arbitrator, on the ground that it did not sufficiently determine all the matters in difference, and did not settle the amount to be paid for certain shares.

Joseph Whitworth and William Wilson Hulse, formerly carried on business in partnership, and afterwards held shares in the Incorporated Company of Whitworth and Co. and the Manchester

(1) 5 C. B. 818; 17 L. J. (C.P.) 215.

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Ordnance and Rifle Company. Various differences arose between them, which had been once ineffectually referred to arbitration, and had also been the subject of a suit in Chancery.

Afterwards, by a memorandum of agreement, dated 15th of December, 1864, they agreed that all matters in difference between them should be referred to J. G. P. Child, and that his decision should be final and conclusive, and that a formal agreement should be prepared for that purpose.

Finally, by an agreement dated 3rd of January, 1865, after reciting the above facts, and the memorandum of agreement, and that on the execution of that memorandum it was understood between them that Hulse should retire from the incorporated company by the sale of his shares to Whitworth, and that Child should determine what sum Whitworth should, upon the balance of accounts between them, pay to Hulse for the transfer of the shares, and should finally decide and determine all matters in dispute between them; and that it had been since agreed that Hulse should assign to Whitworth, or as he might direct, all his interest in the patents, &c., in which he was jointly interested with Whitworth; and that mutual releases should be executed. It was agreed, amongst other things:—1. That the claims and demands of Hulse against Whitworth, in respect of the differences and matters aforesaid, and all matters in dispute between them, and the amount to be paid for the shares, should be, and the same were thereby, referred to the award of Child.

6. That in the event of either of the parties disputing the validity of the award, or moving the Court to set it aside, the Court should have power to remit the matters so referred, or any of them, to the reconsideration of the arbitrator.

7. That the agreement and submission might be made a rule of this Court at the request of either party.

8. That the arbitrator should direct Hulse to assign to Whitworth, or his nominees, his interest in the patents, &c., the joint property of Hulse and Whitworth; and that mutual releases should be executed of all claims and demands up to the date of the agreement.

30th of Dec. The arbitrator made his award, dated the ~~3rd of June~~, 1865, and awarded, First, that Whitworth should, on or before 1st of

June, 1866, pay to Hulse the sum of 22,978*l.*, in full satisfaction and discharge of all claims and demands of Hulse against Whitworth in respect of the differences and matters mentioned in the agreement, and of all other matters in dispute between them, including the amount to be paid by Whitworth to Hulse for the purchase of the shares in the incorporated company mentioned in the agreement. Secondly, that Hulse should assign his interest in the patents, &c., as provided in the agreement, and that mutual releases should be executed.

The Solicitor General, for Whitworth, having obtained the above rule,

James, Q.C., *Milward, Q.C.*, and *Baylis*, for Hulse, shewed cause, and on their refusing to consent to the matter being referred back to the arbitrator, the Court called on

The Solicitor General (*T. Jones* with him) to support the rule. The only complaint we make of the award is that it does not state what amount is to be paid on account of the shares. That is referred as a distinct matter, and ought therefore to be so found, *Randall* v. *Randall* (1), *In re Rider* v. *Fisher*. (2) Without knowing it, it will be impossible to prepare the deed of transfer of the shares, as the Stamp Act (13 & 14 Vict. c. 97, Table. Part 1, Conveyance) requires the consideration to be truly expressed in the instrument of conveyance. He also cited *Richards* v. *Browne*. (3)

MARTIN, B. This rule must be discharged. We ought not to set aside the award unless it is perfectly clear that it is improperly made, and open to an objection which could be raised in an action brought to enforce it. The Solicitor General says that he does not wish it set aside, but only sent back to the arbitrator that he may state the amount to be paid for the shares specifically. And if the other side acquiesced in this proposal it might be done; but they refuse, and are satisfied with it as it is. We have, therefore, to see whether it is a bad award, and I think that it is not. The cases cited were well decided, even according to the present improved practice in such matters. If several matters are referred to an arbitrator, he must decide them all; and again, if on the

(1) 7 East 81. (2) 3 Bing. N. C. 874. (3) 9 Irish Com. Law Rep. 199.

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true construction of the agreement he is to decide the matters referred separately, he must do so; for if this is the bargain of the parties it must be observed, otherwise the arbitrator does not follow the authority given to him. The question is, therefore, does the submission contain anything requiring the arbitrator to decide separately the matters referred to him? So far from that being said, the agreement rather says the contrary. The document of the 3rd of January, 1865, is the formal agreement of the parties, and after reciting that Child should determine what sum Whitworth should, *upon the balance of accounts* between them, pay to Hulse for the transfer of the shares, it refers to his arbitration all matters in dispute between them, and the amount to be paid for the shares. This conveys to my mind the idea that Child is authorized to settle all matters in dispute, and what is to be paid on the whole balance by Whitworth to Hulse. This award directs accordingly that Whitworth shall pay to Hulse 22,978*l.*, and in this the arbitrator appears to me to have exactly pursued his authority.

BRAMWELL, B. I also think the rule should be discharged. If the submission had made it necessary to find separately the sum to be paid for the shares, the award would be bad; and if the construction contended for by the Solicitor General were clear, we must set the award aside or refer it back. All I will say is that it is not clear, and therefore we cannot set it aside; and, as the other side refuse their consent, we cannot send it back. The rule must therefore be discharged, but the matter is one in which the other side should not be too ready to resort to the summary jurisdiction of the Court.

PIGOTT, B. The real question is, what is the true construction of the submission? I read it as my Brother Martin does, and I do not think that the parties intended that the amount to be paid for the shares should be found separately. If this had been their meaning, they would have said so in clear terms, whereas the result they appear to have required was the balance which on the whole account was to be paid to Hulse.

Rule discharged.

Attorney for Whitworth: *J. E. Fox.*

Attorneys for Hulse: *Gregory & Rowcliffes.*

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Evidence—Pedigree—Family bible—Certificates—Power—Wills Act (1 *Vict.* c. 26), *s.* 10.

The provision of the Wills' Act (1 Vict. c. 26), s. 10, making good the execution of powers by will, if executed as provided by the act with respect to wills, relates to powers created since, as well as to powers created before, the act.

Entries of pedigree in a family bible or testament, which is produced from the proper custody, are admissible as evidence, without proof of their handwriting or authorship.

Certificates of births, baptisms, marriages, or deaths, are admissible as evidence, without proof of the identity of the persons mentioned in them with the persons as to whom the fact recorded by them is sought to be established.

THIS was an action of ejectment, tried before Montague Smith, J., at the Stafford spring assizes, 1866. Purden alone appeared to the writ, and defended as landlord of Lees.

The land claimed was land taken on a partition in respect of a moiety which had descended to one Elizabeth Johnson, as co-heiress of her father. By a settlement made on her marriage with George Hewitt Lander, and dated 26th June, 1838, this moiety was conveyed by her to George Blest and his heirs, to the use (after the marriage) of her mother, Mary Johnson, for life, remainder over to various uses (including uses in favour of the husband and wife, and the issue of the marriage), remainder "after the decease of Susannah Smith (who had the last life estate), and in case the said Elizabeth Johnson shall survive the said S. Smith, to such uses, &c., as the said E. Johnson, notwithstanding her said intended coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her legally executed, or *by her last will* and testament in writing, or any codicil thereto, to be by her signed and published in the presence of and attested by *three* or more credible witnesses, shall from time to time direct, limit or appoint, give or devise the same;" remainder to the use of E. Johnson, her heirs and assigns.

Elizabeth Lander (formerly Johnson) survived Susannah Smith, and by her will, dated 1st April, 1852, executed in conformity with the Wills Act, and attested by *two* witnesses only, she

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appointed her moiety to her husband in fee. She died without issue in 1852, and on 11th July, 1856, her husband died intestate as to this land, Mary Johnson, who had the first life estate in the property, surviving both of them. Mary Johnson died on 3rd August, 1856, all the uses previous to the power having failed in her lifetime.

About two years ago, Thomas Purden, the defendant's father, claiming to be heir-at-law of George Hewitt Lander, brought ejectment against the tenants, who made no defence, and he accordingly obtained possession. He afterwards made a voluntary conveyance of the property to Thomas Purden, junior, the defendant.

The plaintiff, John Lander Hubbard, then commenced this action to recover possession of the land.

George Hewitt Lander, whose heir-at-law the plaintiff claimed to be, was great grandson of one Charles Lander, in the male line; the plaintiff was great grandson of one of Charles Lander's daughters, who had married James Moore. Amongst the children of Mrs. Moore, was, besides the plaintiff's grandfather, a daughter named Fanny, who afterwards became Mrs. Wells. Mrs. Wells had a testament, which she had received from her father, and which she gave a few years before her death to James Moore, her father's son by a former marriage; Maria Moore, the daughter of James Moore, received this testament from her father, and she produced it at the trial. It contained various entries of the family pedigree, written on the fly-leaf, which the witness proved were in the book when Mrs. Wells had it, and it was tendered as evidence of the facts so recorded. It was objected that there was no evidence of the authorship or handwriting of these entries.

A number of certificates of births, baptisms, marriages, and burials, were produced from parish registers, and were objected to, on the ground that there was no evidence of the identity of the persons named in them with the persons of the same name who occurred in the plaintiff's line of proof.

It was also objected that the power above mentioned, being created since the Wills Act, was not duly executed by a will attested by only two witnesses.

The learned Judge admitted the evidence, but reserved the point as to the execution of the power, (together with several other

points which it is unnecessary to mention), and a verdict was found for the plaintiff, with leave to the defendants to move to enter a non-suit, or a verdict for them on the points so reserved.

April 20. *Powell, Q.C.*, moved accordingly, and also for a new trial on the ground (amongst others) that the certificates were improperly admitted; and the Court in granting a rule upon the other points, refused it on the objection as to the certificates, saying, that the question of identity was entirely for the jury, and that they would not allow any doubt to be raised upon this point.

May 3. *Gray Q.C.*, and *Dowdeswell*, shewed cause. First, as to the entries in the testament, there is no authority for requiring any evidence as to authorship or handwriting. The ground of admitting in evidence entries made in bibles and testaments of the events of family history is, that they are treated as a quasi-record, and if the book is produced from the proper custody, they prove themselves. Secondly, as to the execution of the power, the words of the statute are distinct, (1 Vict. c. 26. s. 10), that "every will executed in manner herein before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." It is plain that this applies as well to powers created before as after the statute, and it is expressly so laid down by Lord Westbury in *Taylor* v. *Meads*. (1) The decision in that case went, however, upon a ground totally distinct from the present point, for it was there decided, affirming the case of *West* v. *Ray* (2), that a power to execute by deed or writing under seal was not within the section, and that the formalities required in its execution must therefore be strictly complied with; but this power is expressly given to be executed by will.

Powell, Q.C., and *H. Matthews*, shewed cause. The words "*shall have been* expressly required," shew that only wills executed before the statute are intended; and the reason is that before the statute, wills affecting real estate were required to be attested by three witnesses; when the act changed the law on this point it was

(1) 34 L. J. (Ch.) 203. (2) Kay 385; 23 L. J. (Ch.) 447.

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necessary to provide for powers to appoint by will, which in their creation had followed the formalities previously prescribed for wills, and which after the statute were likely to be executed by the donee according to the mode introduced by it; but there was no need to provide for powers created afterwards, and as to which it might be presumed that the donor would comply with the new order of things, unless he deliberately intended the contrary, in which case his direction must be followed. With respect to the testament, it is true that no positive authority can be produced in favour of the objection that evidence of authorship or handwriting must be given; but on the other hand all the cases are consistent with such evidence having been given in fact, and in its absence there is no security against the entries being merely fictitious.

MARTIN, B. This rule must be discharged. The first objection is that the testament produced was inadmissible in evidence. The book was produced by a witness who was niece of Fanny Wells, and to whose father Fanny Wells had given it. Fanny Wells was a granddaughter of the common ancestor, Charles Lander, and had received the book from her own father. It was therefore a family bible, and the witness was its proper custodian. This is all that is required to make it evidence; it is in the nature of a record, and being produced from the proper custody is itself evidence. To require evidence of the handwriting or authorship of the entries, is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been.

As to the objection to the exercise of the power, it is as clear as words can make it that s. 10 of the Wills Act applies as well to powers created since, as to powers created before, the statute, and there can be no doubt that this is what the legislature intended. In effect they say, we are aware that appointments are often required to be made by will in a mode different from that prescribed by the law as to wills in general, and that the courts hold it necessary that the power should be strictly pursued. This how-

ever, causes difficulty, and a frequent failure of execution; and as we now provide what we deem a sufficient protection to the execution of wills, it is expedient that we should further say, that any power to appoint by will shall be deemed duly executed, if the donee complies with these statutory formalities, no matter what additional security or solemnity the donor may have annexed to its exercise. This is good sense, and the intention of the parties is not substantially interfered with, when by the enactment of the new provisions the particular formalities required are laid aside. We have ascertained from my Brother Montague Smith that he had no doubt himself upon this point, nor upon any other of the points reserved, but that under the circumstances of the trial he thought it better to reserve them.

BRAMWELL, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Shirreff & Son.*
Attorney for defendants: *E. Smith.*

DIXON *v.* BATY AND ANOTHER. *April* 19.

Landlord and tenant—Ejectment—Possession—Evidence.

One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire, as against his landlord, a prescriptive title to the land first occupied by him.

ACTION of ejectment, tried before Mellor, J., at the Newcastle Spring Assizes, 1866.

The land claimed was a strip lying between a close of the plaintiff and the highway. The plaintiff proved at the trial that the close had been occupied in succession by William Elliott, the uncle of the defendants, by John Elliott, their father, and by the defendants themselves, since 1824, as tenants of the plaintiff and his predecessors in estate, and that, together with the close, they had occupied the land claimed. For the defendants it was proved by John Elliott, the father, who was 84 years old, that his father,

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Peter Elliott, formerly lived in a house on the other side of the road; and that whilst in occupation of this house, and before becoming tenant of any land owned by the plaintiff's predecessors in estate, he had for some time occupied a cartwright's shop, a garth, and a saw-pit, on the land claimed; that Peter Elliott, about seventy-one years ago, became tenant of the close afterwards held by William Elliott, John Elliott, and the defendants, at a rent of 1*l.*, but that no rent was paid by him for the shop, garth, and saw-pit. The rent of the close had been since raised to 3*l.* 9*s.*, and again, about thirty years ago, to 4*l.* 10*s.*; but one of the plaintiff's witnesses admitted, on cross-examination, that he paid 4*l.* rent for a neighbouring field smaller than the close occupied by the Elliotts. The fact that Peter Elliott occupied the land claimed before he occupied the plaintiff's close, was also sworn to by the sister of John Elliott, aged 81.

Upon this, Temple, Q.C., for the plaintiff, insisted that the presumption that the strip of land occupied by the Elliotts whilst tenants of the plaintiff and his predecessors, was occupied by them on behalf of their landlords, must prevail, unless they could shew a possession of twenty years before their tenancy commenced; but the learned judge ruled to the contrary, and directed the jury, that if they believed that before the Elliotts took the plaintiff's close they were dealing with the land claimed as owners, whether with a rightful or a wrongful title, the defendants were entitled to a verdict.

The jury found a verdict for the defendants, and, in answer to questions put to them by the learned judge, said they were satisfied that Peter Elliott occupied the land claimed as his own, before he became tenant of the plaintiff's close, and that the Elliotts never paid any rent in respect of it.

Temple, Q.C., (*G. Bruce*, with him) moved for a new trial on the ground of misdirection, raising the objection taken by him at the trial, and then overruled.

[MARTIN, B. The occupation by Peter Elliott, which was originally adverse to the plaintiff's predecessors, would continue so in the absence of some circumstance to prove the contrary.]

In the present case, the land claimed is land which by the ordi-

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nary presumption of law would belong to the plaintiff, as owner of the close between which and the road it lies. Under such circumstances the continuance in possession of the land by Peter Elliott, who had acquired no prescriptive or other title to it, after he became tenant to the plaintiff's predecessors in estate, must be taken to have been by the consent of the landlord. Although he did not acquire possession of the land as tenant, he retained it as such.

[POLLOCK, C.B. Not unless he can be shewn to have paid rent, or otherwise acted as tenant in respect of it. He paid rent only for the close, and this is not sufficient to change the character of his possession of land which he already occupied as his own.]

Per Curiam (Pollock, C.B., Martin, Bramwell, and Pigott, BB.).

Rule refused.

Attorneys for plaintiff: *Pattison & Wigg.*

May 3.

TANNER *v.* EUROPEAN BANK, LIMITED.
BOWEN *v.* SAME.

Interpleader—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 12.

A. sued the defendants, to whom he had entrusted a policy for certain specified purposes, and declared in trover and detinue, and specially on the contract. B., who had pledged the policy with A., then brought an action against the same defendants for the recovery of the policy. An interpleader order was made, directing that the proceedings in the first action should be stayed till further order, that A. should be at liberty to defend the second action, indemnifying the defendants, and that B. should give the defendants security for costs:—

Held, that the order was rightly made.

Best v. *Hayes* (1) followed.

RULE obtained by *H. T. Cole* to set aside an interpleader order made in the above actions by Bramwell, B., on the 12th of January, 1866.

Bowen, having mortgaged to Tanner a ship called the *Duchess of Sutherland*, afterwards assigned to him a policy of insurance on that vessel and on another vessel called the *Alliance*. Losses having occurred in respect of both vessels, Tanner, who claimed under an agreement with Bowen the right to hold the money due on

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

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the insurance of the *Alliance*, to cover the money due on the mortgage, intrusted the policy to the defendants with directions to collect the money due on the *Alliance* only, and then to return it to him. They were unable to obtain payment of the insurance money, and whilst the policy was in their hands it was claimed by Bowen, or the inspectors of his estate, who denied the alleged agreement; they therefore refused to return the policy.

The first action was brought against the defendants by Tanner, and the declaration contained counts in trover and in detinue, and also a special count on the contract, laying as the breach that the defendants had refused either to collect the money or to deliver back the policy. The second action was brought by Bowen against the same defendants, after the commencement of the first action, to recover the policy from them.

Upon an interpleader summons taken out by the defendants before Bramwell, B., the learned judge made an order that all proceedings in the first action be stayed until further order; that Tanner be at liberty to defend the second action, giving the defendants an indemnity; and that Bowen give security for costs to the defendants. This was the order complained of.

T. Salter, for the defendants, shewed cause, and contended that the order was warranted by 1 & 2 Wm. 4, c. 58, and by section 12 of the Common Law Procedure Act, 1860.

H. T. Cole, for the plaintiff Tanner, in support of the rule. The Common Law Procedure Act, 1860, s. 12, gives no assistance; the difficulty is, not that the titles of the claimants are adverse, but that the defendants are under a special contractual obligation to Tanner. Tanner declares upon this contract, and the special count prevents any such order being made: for it is impossible that the rights involved in the contract between Tanner and the defendants can be settled in a trial between the defendants and another person who was no party to the contract.

[MARTIN, B., referred to *Best* v. *Hayes*. (1)]

The provision requiring Bowen to give security for costs is an insufficient protection, for in defending the second action Tanner will be put to extra costs, which will not be allowed on taxation;

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

and he will incur these costs in an action not of his own choosing, but which he will be compelled to adopt in order to defend his rights. He will also be prejudiced by the delay caused by the stay of proceedings.

No counsel appeared for Bowen.

MARTIN, B. This rule must be discharged. We are authorized by the interpleader section of the Common Law Procedure Act 1860, (s. 12), and by 1 & 2 Wm. 4, c. 58, wherever an action has been commenced "in respect of a common law claim for the recovery of money or goods," to make such orders therein, "as to costs and all other matters as may appear to be just and reasonable." It is true that the judges, in construing the earlier statute, at first acted on the rule of not making an order unless the Court of Chancery would, under the like circumstances, have admitted an interpleader bill; but by degrees this rule was departed from, and in the case of *Best* v. *Hayes* (1) it was entirely disclaimed, and it was said that the Court had power to do what was just and reasonable without being so fettered. Now, I do not say whether, under the circumstances stated, I should have made the same order as my Brother Bramwell has made; but the order is just and reasonable, and unless we can see clearly that it does some wrong to one of the parties, we ought not to interfere.

BRAMWELL, B. I acted on the authority of *Best* v. *Hayes* (1), not without some misgivings as to its correctness, for I thought the argument on the other side was cogent—that the *jus tertii* ought not to be set up by one who has obtained from the plaintiff, by means of a contract, possession of the property sued for. But following that case, I endeavoured to put Tanner in the same position as if an action had been brought against him by Bowen. The second action will settle the right to the possession of the policy, and no injustice will be done by the order, in respect of Tanner's rights in the first action; for though a bailee, like a tenant, ought not to be permitted to deny the title of the person from whom he has received possession, yet, as the tenant who is evicted from the land may set up this eviction in answer to his landlord's action for rent, so, the bailee who is, as it were, evicted

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by the chattel being recovered from him in an action will, I imagine, be equally entitled to this defence against his bailor: it certainly *ought* to be so. Then, if Bowen can in the second action evict the defendants, which he can only do by shewing an absolute title to the policy, they have an answer to the plaintiff's claim of the policy in the first action. Therefore I think the order was in substance rightly made; it may be subject to revision in its details, and if Tanner wishes to go on with his action for the purpose only of recovering special damages on the contract, I should say that he might be allowed to do this, the right to the chattel being made to depend on the result of the other action. My recollection, however, of the matter is that this offer was made by me and refused. I will add that, if no title to the policy had been shewn in Bowen, I should not have made the order, but my impression was that a sufficient primâ facie title was made out to justify the defendants in asking for it.

PIGOTT, B. I am of the same opinion; and it appears to me that great pains has been taken by my Brother Bramwell to secure justice to the plaintiff. The complaint made on the plaintiff's behalf—that he may be subjected to unreasonable delay by reason of the stay of proceedings till further order—is groundless, for he will always be able, by application to a judge at chambers, to force Bowen on to trial; and as soon as that matter is settled (which it might have been long since, had the order been followed), he will be at liberty to proceed on the special contract. As to the argument that there was no jurisdiction to make the order, it is clear that, whether or not it is within the first Interpleader Act, it is within section 12 of the Common Law Procedure Act, 1860. The construction put upon the latter act by this Court in *Best* v. *Hayes* (1) I think correct; and I am glad the Courts have not consented to limit the power given them.

Rule discharged.

Attorney for plaintiff: *T. Baker, jun.*
Attorneys for defendants: *Taylor & Jaquet.*

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

[IN THE EXCHEQUER CHAMBER.]

FLETCHER *v.* RYLANDS AND ANOTHER. 1866
Trespass—Duty of owner of land—Negligence—Water. May 14.

One, who for his own purposes brings upon his land, and collects and keeps there anything likely to do mischief if it escapes, is primâ facie answerable for all the damage which is the natural consequence of its escape.

The defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed by the underground communication into the plaintiff's mines:—

Held, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused.

ERROR from the judgment of the Court of Exchequer on a special case.

Declaration. First count, that the defendants were possessed of land in the township of Ainsworth, except the mines and veins of coal under the surface; and that the plaintiff was possessed of coal mines lying near the defendants' land; and that by reason thereof, and of a licence from the person in possession of certain underground cavities near the mines, he was entitled to use those cavities for the purpose of working the mines, and getting coals from the mines and carrying them through the cavities; yet the defendants so carelessly and negligently constructed on the said land a reservoir to contain water, and kept therein, in their possession and under their care, large quantities of water, and took so little and such bad care of the water that large quantities thereof, by reason of the premises, escaped from the reservoir and flowed towards and into the said mines and cavities, whereby the plaintiff was prevented for a long time from working the mines, and getting coal therefrom, and carrying the same through the

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cavities, and was put to expense in pumping out the water and repairing damage done by it, and lost gains and profits; and that such reasonable fear of being drowned in the mines and cavities was caused in the minds of workmen then and theretofore employed in the mines, and of others, that the working of the mines was rendered permanently more expensive and more difficult than it had been or would otherwise have continued to be.

Second count, that the plaintiff was possessed of coal mines, and that by reason thereof, and of a licence, &c. (repeating the allegations as to the cavities); and that the defendants were possessed of large quantities of water then by the defendants kept in a reservoir near to the mines and cavities; yet the defendants took so little and such bad care, &c. (repeating the allegations as to negligence and damage to the end of the first count).

Third count, that the plaintiff was possessed of mines and veins of coal in and under certain land, and the defendants were possessed of the said land above part of the said mines and veins; yet the defendants so negligently, carelessly, and improperly made and constructed a reservoir on the said land, and collected and dammed up thereon large quantities of water on the surface; that by reason of the premises large quantities of the said water flowed and forced their way through and out of the reservoir, towards, to, and into the mines and veins of coal of the plaintiff, whereby the mines and veins of coal were much damaged, and the plaintiff was prevented, &c. (repeating the allegations as to damage).

Plea, Not guilty. Issue thereon.

The action came on to be tried at the Liverpool summer assizes, 1862, and a verdict was entered for the plaintiff for 5000*l.*, subject to an award on the terms mentioned in an order of nisi prius, made 3rd of September, 1862. By a subsequent order of Channell, B., made 31st of December, 1864, the arbitrator was empowered, instead of making an award, to state a special case for the opinion of the Court of Exchequer, in such form as he should think fit, and it was ordered that the verdict should be subject to such special case, and that error might be brought on the judgment thereon, and on the judgment of the Exchequer Chamber, in the same manner as on a judgment on a special verdict.

The special case was argued in the Court of Exchequer in Trinity

Term, 1865, before Pollock, C.B., and Martin and Bramwell, BB., and judgment was given for the defendants by Pollock, C.B., and Martin, B.; Bramwell, B., dissenting. (1)

On this judgment the plaintiff brought error. The case stated as follows:—

The plaintiff had, since 1850, occupied a colliery in the township of Ainsworth, called the Red House Colliery, as tenant to the Earl of Wilton.

The defendants owned a mill, called the Ainsworth Mill, lying to the west of the Red House Colliery.

In 1860, the defendants, in pursuance of an arrangement with Lord Wilton, made a reservoir for their mill in other land of Lord Wilton's lying to the north-west of the colliery, and separated from it, and from the mill, by lands belonging to two persons named Hulton and Whitehead. Whitehead's land lay to the north of and adjoining the land over the Red House Colliery; on the west it adjoined Hulton's land; and on all other sides was surrounded by Lord Wilton's land. Hulton's land lay to the west of and adjoining Whitehead's land; on the north it adjoined the land of Lord Wilton, in which the reservoir was constructed, and on the south it adjoined the Red House Colliery and the defendants' mill, the mill being to the west of the colliery.

The seams of coal belonging to the Red House Colliery are continued under the lands of Hulton and Whitehead, and under the lands in which the reservoir was made, and their dip is downwards from north-east to south-west. The coal under the site of the reservoir, and under Lord Wilton's land lying between that site and Hulton's land, as well as under the lands of Hulton and Whitehead, had at some time beyond living memory been partially worked; and, before the commencement of the plaintiff's workings at the Red House Colliery, the old coal workings under the site of the reservoir communicated with old coal workings under Whitehead's land by means of the intervening old coal workings under the land of Hulton and under the land of Lord Wilton lying to the north of Hulton's land.

Soon after the plaintiff commenced to work the Red House

(1) 3 H. & C. 774; 34 L. J. (Ex.) 177.

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Colliery in 1850 he made arrangements with Whitehead to work the ungotten coal lying under Whitehead's land by means of the Red House pit; and in 1851 he accordingly worked through from the Red House Colliery into the coal under Whitehead's land, and so into the old workings there. This was done in the first instance without the knowledge of Lord Wilton; but afterwards, and whilst the plaintiff was working this coal by the Red House pit, the fact became known to the earl's agents, and from that time the plaintiff so worked it without any objection on the part of the earl or his agents.

In consequence of these workings, the old coal workings under the site of the reservoir were, by means of the intervening underground workings, made to communicate with the plaintiff's coal workings in the Red House Colliery; so that water which found its way into the old workings under the reservoir would, by means of this communication, flow down to and into the Red House Colliery.

These underground communications were effected several years before the defendants commenced making their reservoir, and continued down to the time when it burst; but until that time their existence was not known to the defendants, nor to any agent of theirs, nor to any other person employed by them; neither was it till that time known to them, or to any of the persons employed by them in or about the selecting of the site, or the planning or constructing of the reservoir, that any coal had been worked under the reservoir, or under any of the land of Lord Wilton lying to the north of Hulton's land.

In the course of constructing and excavating for the bed of the reservoir, five old shafts, running vertically downwards, were met with in the portion of land selected for its site; but though the timber sides of three of them remained, the shafts themselves were filled up with soil; and it was not known to or suspected by the defendants, or any of the persons employed by them in making the reservoir, that they led down to old coal workings under its site.

For the selection of the site, and for the planning and construction of the reservoir, it was necessary that the defendants should employ an engineer and contractors; and they did for those purposes employ a competent engineer and competent contrac-

tors, by whom the site was selected, and the reservoir planned and constructed. On the part of the defendants themselves there was no personal negligence or default whatever; but, with reference to the shafts met with, reasonable and proper care and skill were not exercised by the persons they employed, to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.

The reservoir was completed about the beginning of December, 1860, and the defendants caused it to be partially filled with water. On the morning of the 11th December, whilst it was thus partially filled, one of the shafts gave way and burst downwards, and the water flowed into the old coal workings beneath, and by means of the underground communications found its way into the coal workings in the Red House Colliery, and flooded the colliery, so that its working was necessarily suspended, and after some unsuccessful attempts to renew it, the colliery was finally abandoned.

The question stated for the opinion of the Court was, whether the plaintiff was entitled to recover any, and, if any, what damages from the defendants, by reason of the matters hereinbefore stated. (1)

Feb. 8. *Manisty, Q.C.* (*J. A. Russell* with him), for the plaintiff. First, omitting the consideration that the defendants became tenants of Lord Wilton, the plaintiff's landlord, subsequently to the demise to the plaintiff, and to the making of the works connecting the underground passages, and dealing with the matter as if they were mere strangers, the plaintiff is entitled to recover damages. The principle of law which governs the case is, that he who does upon his own land acts which, though lawful in themselves, may become sources of mischief to his neighbours, is bound to prevent the mischief from occurring, or in the alternative to make compensation to the persons injured. This will be peculiarly the case when the act done consists in the construction and use of artificial works, for the purpose of collecting and impounding in vast quantities an element which will certainly cause mischief if

(1) The case contained various statements for the purpose of shewing the damage suffered by the plaintiff; but as there was no argument or decision as to the amount of damages, those statements are omitted. See note at end of case.

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it escapes. The case does not resemble that of a servient and a dominant tenement with acquired rights, as seems to have been thought by Martin, B., in his comment upon *Tenant* v. *Gold win* (), and the duty is independent of the immediate neighbourhood of the lands. Neither is the circumstance material which is relied on by the Chief Baron, that the communication by which the water passed was underground and unseen; for the plaintiff's right of action is founded on his absolute right to enjoy his property undisturbed by the acts of his neighbours, and is independent of the amount of care exercised by them, or of their means of knowledge. This is the effect of *Lambert* v. *Bessy* (2), and the opinions there pronounced.

[BLACKBURN, J. In the cases put there the things done were all primâ facie wrong, but the difficulty here is in saying that what was rightful in the first doing, became wrongful in the continuance. The other side will contend that their duty was to take care, but not to take successful care.]

The duty is the same as that of rendering support to neighbouring land, from which the landowner is not excused by his ignorance of the state of adjoining land which may contribute to the injury, or of the position of the strata which he cannot know; he is absolutely bound not to injure his neighbour by the withdrawal of support: *Bonomi* v. *Backhouse*. (3) Similarly the mine-owner who works to the edge of his land subjects himself to the natural flow of water into his mine, but not to the flow of water artificially brought there by a neighbouring mine-owner; these two propositions are established by the cases of *Smith* v. *Kenrick* (4) and *Baird* v. *Williamson*. (5) The case of *Hodgkinson* v. *Ennor* (6) is an authority for the plaintiff, resembling the present case in the fact that the communication by which the defendant's dirty water flowed to the plaintiff's premises was underground.

[BLACKBURN, J., referred to the case of damage done by the bursting of waterworks companies' reservoirs.]

(1) 2 Ld. Raym. 1089; 1 Salk. 21, 360.
(2) Sir T. Raym. 421.
(3) 9 H. L. C. 503; E. B. & E. 622, 659; 27 L.J. (Q.B.) 378; 28 L. J. (Q.B.) 378; 34 L. J. (Q.B.) 181.
(4) 7 C. B. 515.
(5) 15 C. B. (N.S.) 376; 33 L. J. (C.P) 101.
(6) 4 B. & S. 229; 32 L. J. (Q.B.) 231.

Such cases usually arise under a clause in the special act of the company, imposing on them a liability to make compensation. The case, however, of *Bagnall* v. *London & North Western Railway Company* (1), though not so simple in its circumstances as the present, is in principle indistinguishable.

[BLACKBURN, J. The point in that case was, that however the water got upon the line, the company were bound by their act to have their drains in order to carry it off, and that their drains were not in order.

WILLES, J. That was certainly the ground of the judgment of this Court.]

The principle contended for is laid down in *Aldred's* case (2); and in *Williams* v. *Groucott* (3) by Blackburn, J., who says, "when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights;" and by Gibbs, C. J., in *Sutton* v. *Clarke* (4), who, distinguishing the case then before him, says: "This case is perfectly unlike that of an individual, who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour; if he thereby unwittingly injure his neighbour, he is answerable." The question as to the purity or impurity of the water discharged is immaterial, the same principle applies to both cases.

[BLACKBURN, J. It is a different sort of mischief, but it is equally a mischief.]

Chauntler v. *Robinson* (5) is no authority against the plaintiff; for it decides nothing but that the owner of a house is not obliged to repair merely because he is owner. The case, however, mostly relied upon on the other side is *Chadwick* v. *Trower* (6); the plaintiff there was held to have no right to support for his vault from the vault of his neighbour, who was ignorant of the existence of the plaintiff's vault, and the judgment proceeded on the ground

(1) 7 H & N. 423, 452; 31 L. J. (Ex.) 121, 480.
(2) 9 Rep. 57 b.
(3) 4 B. & S. at p. 157; 32 L. J. (Q.B.) 237.
(4) 6 Taunt. at p. 44.
(5) 4 Exch. 163—170.
(6) 6 Bing. N.C. 1.

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of the absence of right to such support, and on the fact that no circumstances existed imposing on the defendant the duty of care.

[LUSH, J. In fact the plaintiff there sought to impose a servitude on the defendants' premises.]

Secondly, the plaintiff was tenant of Lord Wilton, and the communication was effected by workings made with the landlord's consent nine years before the defendants became tenants of the site of the reservoir; the defendants could only take their land subject to the obligation which was imposed upon the landlord by this state of facts.

Thirdly, the defendants were liable for the negligence of the persons who made the reservoir; for, first, they could not discharge themselves of their duty of care by employing them, and secondly, the knowledge of those persons of the existence of the shafts was notice to the defendants both of the facts and of the danger.

Mellish, Q.C. (*T. Jones* with him), for the defendants. The question is a novel one, but authority and reason are in favour of the defendants. It is true the defendants have altered the condition of their land, but on the other hand, if the plaintiff had left the intervening land in its natural state, no mischief would have ensued. The mischief was caused by secret acts done partly by strangers, partly by the plaintiff himself, which have broken down the natural partition of the lands, and opened the channels by which the water has come, and it will be strange if those secret acts, not communicated to the defendants, should impose on them a liability. But on broad principles, there is no such obligation as is contended for on the other side. The only obligation on the defendants is to take care, that is, *reasonable care*, not to injure the property of others; and to establish their liability in this action, it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbour's property from anything done upon his own land. It is clear that there is no such obligation with respect to personal property. The right, not to have "foreign water" sent upon one's land, is not a greater or more important right than the right not to have one's person injured, but in the latter case no right of action arises unless the damage is caused by the direct act of the defendant himself, or by his negligence. The same rule applies

to real property, and though the cases are fewer they are to this effect. The instances in which the owner of real property has been held liable may be classified thus: first, acts of trespass; second, acts purposely done, and which are calculated to cause the injury complained of, as in *Aldred's* case (1); third, cases where, by reason of the natural relation of the properties, a legal relation has been constituted between them; as in the case of the right to support, or the right to a watercourse, which are natural easements, and as to which the plaintiff need not allege any special title in himself, nor any negligence in the defendant. Here no right of this latter class is involved, but the right is the same as the right of any subject not to be injured by any other subject; and the fallacy in the judgment of Bramwell, B., in the court below is, in assuming that there is any such right as "to be free from foreign water," or "not to have water turned in upon one." There is no such right distinct from the general right of ownership in the soil, and the case stands on the same footing as if the owner had himself been drowned at the bottom of the mine. The second class of cases is illustrated by *Hodgkinson* v. *Ennor* (2), for it was there found as a fact that the defendant knew that the channel down which he poured the dirty water would carry it to the plaintiff's premises; he threw it into the swallet meaning that it should be carried away, and it might perhaps be admitted that, having done this intentionally, he would be liable whether he knew where it would go to or not; but the defendants here have tried to keep the water in, but by its own weight it has forced its way through.

[LUSH, J. Suppose the bank of the reservoir had burst, and the water had flowed over the surface and down the pit's mouth.]

The distinction between the surface and underground passages is only material as a circumstance of negligence; with reference to the surface, the facts are known which give rise to the obligation to take care, but the ignorance of the state of things underground takes away the opportunity of exercising care, and therefore the duty to exercise it. It is for this purpose only that the defendants rely on the case of *Chadwick* v. *Trower* (3); sup-

(1) 9 Rep. 57 b.

(2) 4 B. & S. 229; 32 L. J. (Q.B.) 231.

(3) 6 Bing. N.C. 1.

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posing it made out that there is no liability except where there is carelessness, that case shews that there can be no carelessness where there is no knowledge, nor any circumstances giving the means of obtaining knowledge, with a duty to know; and there is no case where a defendant has been held liable without such knowledge or notice. That being so, it is immaterial whether or not the duty to take care means a duty to insure against all consequences, for the occasion of that duty has never arisen.

[BLACKBURN, J. The present point may be illustrated thus: suppose a man leans against my cart, if I remove the cart suddenly, and without warning, not knowing he is there, I am not liable, but if I do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him.

WILLES, J. Take the case of a continuous nuisance, I mean continuous in its own character; the person who erects it is liable at once, the person who succeeds to it is not liable unless he has notice and continues it, but it is said that as soon as he has notice of it he must abate. Suppose a man to collect a quantity of springs in such a manner as to cause them to pour down his neighbour's mine. Assuming that the person who succeeded to the possession of the land where the springs were so collected would not be liable until notice, yet you would admit that upon receiving notice he would be liable for continuing it. Then is there any case where the same doctrine has been held to apply to the originator of the nuisance ?]

It is submitted that the liability would turn on the defendants' knowledge, and that in each case knowledge is the essential condition of liability. In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shewn. This is illustrated by the case of *Scott* v. *London Dock Company* (1), where it was never doubted that negligence must be alleged and proved, and the only question was, whether the fact, that the bale which fell was under the management of the defendants' servants, was sufficient primâ facie evidence of negligence. A common instance is that of collisions of ships at sea, or accidents caused by driving or

(1) 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.

11 Jur. N.S. 264

riding along the highway, as *Hammack* v. *White* (1), in all which cases without negligence there is no liability.

[LUSH, J. Suppose the case of a gunpowder magazine bursting, what liability do you say its owners would incur?]

None, if there was no negligence as to the place where the powder was kept, or in the manner of keeping it. The liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbours by fire arising on your own property, is said to have been by the custom of the realm: *Turbervil* v. *Stamp* (2); Com. Dig., Action on the case for negligence (A 6); and since the passing of 14 Geo. 3, c. 78, and the decision upon s. 86 of that act in *Filliter* v. *Phippard* (3), the liability for injury by fire is restricted to mischief arising from negligence, that is, it is put on the same footing as liability for other injuries. The sum of the argument is, that to make the defendant liable a wrongful act must be shewn, and that to prove the act wrongful you must prove it negligent.

[WILLES, J., referred to *Gregory* v. *Piper*. (4)]

That was a case of trespass, to which this cannot be compared, nor is there any count in trespass here. In *Gregory* v. *Piper* (4), it was proved to be impossible that the act of the defendant's servant could be done as the defendant directed without committing a trespass; the act, therefore, became the direct act of the defendant, and that was the ground of the judgment. The distinction is between acts done directly by the defendant, which include all acts which are specifically directed by him, although not done by him physically or in his presence, and things which are only the consequences of what he does or directs to be done; it is in respect of these last that negligence is material.

[BLACKBURN, J., referred to *Tenant* v. *Goldwin*. (5)]

That case is open to the same observation; the mischief was the inevitable consequence of the combined facts that the defendant put the filth there, and that he did not repair the wall, which was his own wall. The case may indeed be put as a case of negligence,

(1) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.
(2) 1 Salk. 13.
(3) 11 Q. B. 347.
(4) 9 B & C. 591.
(5) 2 Ld. Raym. 1089; 1 Salk. 21, 360; 6 Mod. 311; Holt 500.

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the negligence consisting in taking no care to prevent the filth from flowing into his neighbour's premises.

With respect to the cases cited upon the other side, they are all distinguishable. *Bonomi* v. *Backhouse* (1) belongs to the third class of cases mentioned above, and depended on the right arising by reason of the contiguity of the lands. *Lambert* v. *Bessy* (2) was a case of trespass. *Baird* v. *Williamson* (3) was a case in which the defendant purposely caused the water to flow into the adjoining mine; no right is contended for here to use the plaintiff's land as an outlet. On the other hand, the language used in *Smith* v. *Kenrick* (4) supports the defendants' contention, "it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." *Aldred's* case (5) was also an instance of an act purposely done, and calculated to cause a nuisance: *Bagnall* v. *London & North Western Railway Company* (6) turned upon the obligation imposed upon the company by their act. As to the dictum of Gibbs, C.J., in *Sutton* v. *Clarke* (7), it was pronounced obiter, the decision in the case being in favour of the defendants on the ground that they were public trustees.

Secondly, the defendant is not liable for the negligence of the contractors employed by him. It was laid down in *Butler* v. *Hunter* (8), that when one gives an order to a skilled person to do a particular thing, he must be taken to mean that it shall be done with the proper precautions. The negligence of the contractor was negligence towards his employer as well as towards third persons, and he, as the wrong doer, is liable to actions by both parties, who have been both in different ways injured by his carelessness; but the plaintiff having a right of action against him,

(1) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.
(2) Sir T. Raym. 421.
(3) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101.
(4) 7 C. B. at p. 564.
(5) 9 Rep. 57 b.
(6) 7 H & N. 423,; 31 L. J. (Ex.) 121, 480.
(7) 6 Taunt. at p. 44.
(8) 7 H & N. 826; 31 L.J. (Ex.) 214.

there is a presumption against the liability of the defendants, for the plaintiff would then have a double remedy.

[WILLES, J., referred to *Pickard* v. *Smith.* (1)]

Manisty, Q.C., in reply. It seems to be admitted that if a trespass has been committed the defendants are liable; and here the collecting of the water in such a manner as to invade the premises of the plaintiff was a trespass; as there would have been a trespass in *Bonomi* v. *Backhouse* (2) if the consequence of the withdrawal of support had been to let down a house upon the plaintiff's land; and as the flow of the filth is actually described to be in *Tenant* v. *Goldwin.* (3) He also referred to the case of *Barber* v. *Nottingham & Grantham Railway Company* (4) handed to him by McMahon.

[*Mellish, Q.C.* That case turned on the language of the defendants' special act; I argued the case, and the Court refused to give any answer to my question, whether at common law an action would lie.]

Cur. adv. vult.

May 14. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.), was delivered by

BLACKBURN J. This was a special case stated by an arbitrator, under an order of nisi prius, in which the question for the Court is stated to be, whether the plaintiff is entitled to recover any, and,

(1) 10 C. B. (N.S.) 470. The defendant occupied a refreshment-room and coal cellar at a railway station, the trap of the coal cellar being in the platform of the station. The plaintiff, a passenger by the railway, as he was going along the platform, fell down the opening whilst the trap-door was raised for the purpose of the coal merchant discharging coal into the cellar, and was under the coal merchant's control. It was held that the defendant was liable as the occupier of the cellar; and in delivering the judgment of the Court, Williams, J., after referring to the rule which exempts the employer from liability for the negligence of an independent contractor employed by him to do a lawful act, says (p. 480): "The rule, however, is not applicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer, and neglects its fulfilment, whereby an injury is occasioned."

(2) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

(3) 2 Ld. Raym. 1089; 1 Salk. 21, 360.

(4) 15 C. B. (N.S.) 726; 33 L. J. (C.P.) 193.

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if any, what damages from the defendants, by reason of the matters thereinbefore stated.

In the Court of Exchequer, the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the court. The only question argued before us was, whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants, by reason of the matters stated in the case, and consequently, that the judgment below should be reversed, but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case [see pp. 267-8], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears, [see pp. 268-9] that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the

reservoir with reference to these shafts. The consequence was, that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are reponsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to

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the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. 4. 11. placitum 10, Brian C.J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant* v. *Goldwin* (1), which will be referred to afterwards. It was trespass with cattle. Plea, that

(1) 2 Ld. Raym. 1089; 1 Salk. 360.

the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C.J., says: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox* v. *Burbidge* (1), Williams, J., says, "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May* v. *Burdett* (2), the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that, "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*." And in 1 Hale's Pleas of the Crown 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for *though he use his diligence* to keep him up, if he escape and do harm, the owner is liable to answer damages;" though, as he proceeds to shew, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the

(1) 13 C. B. (N.S.), at p. 438; 32 L. J. (C.P.) 89. (2) 9 Q. B. at p. 112.

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natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. Dig. Droit. (M.2.) it is said that, "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose *at his peril*, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres *at his peril*." The authority cited is Dyer, 372 b., where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle *at his peril*, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert Nat. Brevium, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively, Dyer 372, Rastal Ent. 621, 20 Ed. 4. 10, although wild dogs, &c., drive the cattle of the one into the lands of the other." No case is known to us on which in replevin it has ever been attempted to plead in bar to an avowry for distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox* v. *Burbidge* (1), that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant* v. *Goldwin* (2), is an express authority that the duty is the same, and is, to keep them in at his peril.

As Martin, B., in his judgment below appears not to have

(1) 13 C. B. (N.S.) at p. 438; 32 L. J. (C.P.) 89.

(2) 1 Salk. 21, 360; 2 Ld. Raym 1089; 6 Mod. 311.

understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (solebat) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (jure debuit reparari)." Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to shew that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the wall de jure debuit reparari by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that after consideration the Court gave judgment for him on the second ground. In the report of 6 Mod. (1) it is stated, "And at another day per totam curiam: The declaration is good; for there is a sufficient cause of action appearing in it; *but not upon the word solebat.* If the defendant has a house of office inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is

(1) At p. 314.

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bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in Dyer (1) as is referred to in Com. Dig. Droit. (M.2). Lord Raymond in his report (2) says: "The last day of term, Holt, C.J., delivered the opinion of the Court, that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; *that they did not go upon the solebat, or the jure debuit reparari*, as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who had been counsel in the case, reports the judgment much more concisely (3), but to the same effect; he says: "The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C.J., in the cases already cited in 20 Ed. 4. Martin, B., in the Court below says

(1) See ante, p. 282. (2) 2 Ld. Raym. at p. 1092. (3) 1 Salk. 361.

that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will shew that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shewn; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the

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noisome vapours to arise on his premises, and suffered them to come on the plaintiff's, without stating there was any want of care or skill in the defendant, and that the case of *Tenant* v. *Goldwin* (1) shewed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by Gibbs, C.J., in *Sutton* v. *Clarke* (2), though not necessary for the decision of the case, shews that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack* v. *White* (3); or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott* v. *London Dock Company* (4); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of

(1) 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod, 311.
(2) 6 Taunt. at p. 44.
(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.
(4) 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.

care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what primâ facie was a trespass, can be explained on the same principle, viz., that the circumstances were such as to shew that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case [pp. 268—9].

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again. (1)

Judgment for the plaintiff.

Attorneys for plaintiff: *Clarke, Woodcock & Ryland.*
Attorneys for defendants: *Milne & Co.*

(1) On a subsequent day (June 18), *Manisty, Q.C.*, stated to the Court that the damages had been agreed at 937*l.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXIX VICTORIA.

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May 25.

In the Matter of EARL COWLEY'S SUCCESSION.

Succession duty—Expenses of management incurred by trustees—Necessary outgoings—Annual value—16 & 17 *Vict. c.* 51, *ss.* 21, 22.

In estimating the value of a succession to lands the legal estate in which is vested by will in trustees, the cestui que trust is not entitled to deduct as "necessary outgoings" reasonable expenses of management incurred, independently of his control, by the trustees acting under an authority given to them by the will.

In re Elwes (1) followed.

This was a petition, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50, against an assessment made by the Inland Revenue Commissioners on the petitioner, in respect of a succession accruing to him under the will of the Earl of Mornington. The circumstances of the case were as follows:—

By a will, dated 27th June, 1863, Lord Mornington, after bequeathing certain legacies and annuities as therein mentioned, which were directed to be paid out of the income of the testator's general

(1) 3 H. & N. 719.

residuary estate, and after disposing of his personal estate as therein mentioned, devised the whole of his real estate to W. B. Glasse and A. A. Collyer-Bristow, their heirs and assigns, upon trust, to pay the interest of several mortgages, to keep up his mansion house, to pay fire insurance, and to pay such parts of the annuities before mentioned as the residuary estate might be insufficient to meet; and subject and charged as aforesaid upon trust for Earl Cowley for life, with remainders over. The will directed the trustees, during the continuance of the mortgage debts, and of a certain annuity specified, to continue in possession or receipt of the rents and profits of the premises, to manage them, and generally to deal with them as if they, the trustees, were the absolute owners thereof. Authority was also given to them to appoint stewards, agents, receivers, surveyors, bailiffs, and others, for the general letting and management of the premises, subject to the trusts of the will, and the collecting the rents and profits thereof, and out of the rents and profits to pay to the persons so employed such reasonable allowances as to the trustees should seem fit.

The testator died in July, 1863, leaving his real estate subject to the payment of mortgage debts to a considerable amount, and to the payment of the annuities mentioned. Since his death, the mortgage debts being still unsatisfied, and the specified annuity still subsisting, the trustees have managed the estate, and necessarily employed resident agents, superintendents, and receivers, to whom reasonable remuneration has been paid. In his return of the succession accruing to him under Lord Mornington's will the petitioner claimed to deduct under the provisions of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 22, as "necessary outgoings," the sum of 1100*l.*, being the amount of the salaries paid to the agents and the percentage paid to the receivers by the trustees, but the commissioners refused to make the allowance claimed, and made their assessment, excluding the mortgages and annuities only. The petitioner thereupon brought this appeal.

The 16 & 17 Vict. c. 51, s. 21, defines the interest of every successor in real property to be "of the value of an annuity equal to the annual value of such property after making such allowances as are hereinafter directed." Section 22 enacts that "in estimating the

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annual value of lands used for agricultural purposes, houses . . . . and other property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made for all *necessary outgoings*."

Bovill, Q.C., and *Hannen*, for the petitioner. The Succession Duty Act is, according to its title, "for granting duties on successions," and s. 2 defines a successor to be a person "beneficially entitled." Now, Lord Cowley is not beneficially entitled to the amounts expended by the trustees in management, any more than to the sums paid by way of interest on the mortgages and by way of annuity. Section 20 enacts that the duties are to become payable on the successor coming into possession, but Lord Cowley comes into possession of nothing but the surplus after the expenses and charges are paid. Possibly there might be no surplus, and can it be considered that if there were none, he would still be liable to pay duty on these expenses over which he has no control whatever? Again, ss. 21, 22 prescribe the mode of ascertaining the annual value of a succession, and allowances are directed to be made in respect of "necessary outgoings." These expenses are "necessary" as far as Lord Cowley is concerned, because he has not, and could not have any control over them. In *In re Elwes* (1) similar charges were not allowed, but in that case the successor, though a minor absent from England, was in possession, and might, had he pleased, have controlled the expenses incurred. In the present case, Lord Cowley is entitled to succeed only to what remains after the charges are paid, and after the trustees of the estate have spent what they please on management, possibly much more than he would have spent himself. The latter item of expenditure is as much a "charge" as the mortgages or annuities, and ought to be deducted in the same manner.

The Attorney General, for the Crown. *In re Elwes* (1) is a direct authority in favour of the Crown. There precisely similar expenses were not allowed as "necessary outgoings." The circumstance that here the legal estate is in trustees can make no difference. The thing assessed is Lord Cowley's succession in the hands of the trustees, and for the purposes of assessment the legal and beneficial

(1) 3 H. & N. 719.

interests are united (ss. 42, 44). If the Court were to hold otherwise, a testator might always evade duty, simply by placing his estate in the hands of trustees with discretionary powers of management. The words "annual value," in s. 21, refer not to the quantum of beneficial interest in the successor, having regard to his personal condition, but to the annual value of the subject matter assessed. This case differs from those where a paramount charge is deducted. Suppose, for example, the testator had given a fixed sum to the trustees as compensation for the expenses of management. That sum would then, it is true, have been deducted from the succession of Lord Cowley, but duty would have been payable on it separately. Here the trustees take no beneficial interest whatever, and therefore pay no duty personally. The will contains mere directions for management, and money paid to agents, &c., is in no sense a "charge;" nor an "incumbrance" under s. 34; nor a "contingent incumbrance" under s. 35.

Bovill, Q.C., in reply.

POLLOCK, C.B.: I believe we are all of opinion that our judgment ought to be for the Crown. The case of *In re Elwes* (1) is a direct authority, assuming that there is no distinction between the cases where the expenses claimed to be deducted are incurred individually by the successor, or, as in this case, by trustees who are acting for him. It is said they are not trustees for him only. Properly speaking they are trustees for the whole estate, but they are also trustees for him, and it appears to me that that distinction, which no doubt is a distinction in point of fact, and may be so speciously stated as for a moment to create a possible doubt, vanishes altogether as soon as we look at the entire question, and all the elements that should be considered in coming to a determination upon it. It might be said that if a man is under the absolute necessity of incurring certain expenses before he can get that which is bequeathed to him, he ought to be allowed the deductions in respect of them. If that proposition were nakedly stated it would appear to be not at all unreasonable, but the moment we look at the object of the tax, and examine upon what principle the act of parliament is to be administered, we see it to be without foundation. Certainly the

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Crown ought not to receive less because a particular individual receives more. If one man has left him a 100*l.* a year, the rent of a house, for example, which he can collect in the next street, he pays upon that 100*l.* a year. If, instead of the rent being capable of collection in the next street, it is to be collected a hundred miles off, it is quite clear that no deduction can be made from the value of the succession because the property is at a great distance. I think it may be laid down as a clear deduction from the different clauses of the act, that the duty depends on the value of the property, not with respect to the expenses that the individual may have occasion to incur in the collection, but with respect to the property itself. If he has so much that he cannot possibly collect it himself, that is no reason why the Crown should get less than if it were divided among 100 or 200 people, who could each collect their shares without expense. According to the argument on the part of Earl Cowley, the more wealthy the man is by a large bequest, so much more is the Crown to lose in consequence of his inability to collect and deal with the whole. Therefore it appears to me to be quite clear that what may be called the charges of collection, and those expenses which must be incurred in reference to stewards and collectors of rents are no deductions from the claim of the Crown in respect of duty.

Again, if you look at the facts of this case, it is very true that Lord Cowley possesses—that is, the trustees possess for him—a certain amount, out of which they pay an allowance at their pleasure; but it is not pretended that more is paid than is necessary, and it may be taken, therefore, that no more is paid than Lord Cowley would have had to pay if the property had been left directly to him, subject to all these charges. Then the question remains, whether the intervention of trustees should create any difference? It appears to me, that though there is an apparent difference in point of name, there is no real difference in point of fact, and for these reasons I think our judgment should be for the Crown.

MARTIN, B. I am of the same opinion. The substantial question in this case is, whether, in ascertaining the amount of the property on which the calculation is to be made for succession duty, the expenses of management are to be deducted. It seems to me

that the case of *In re Elwes* (1) has decided the point, and that that case is an authority for our judgment here. But when we look at s. 44 of the act, I apprehend there can be no doubt about it, for that section enacts, that "the following persons, besides the successor, shall be personally accountable to Her Majesty for the duties payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them, that is to say, trustee, guardian, &c., in whom any property, or the management of any property subject to such duty, shall be vested"; and the section proceeds to enact that such persons shall be authorized to pay or commute any duty, and retain out of the property subject to such duty the amount thereof. And I apprehend, therefore, that if these trustees had been called upon to make a return instead of Lord Cowley, they would not upon the authority *In re Elwes* (1) be entitled to deduct the 1100*l*. But I also think that s. 21, coupled with s. 34, establishes the same thing; for the interest of the successor is to be considered "the value of an annuity equal to the annual value of such property" after making such allowances as thereinafter directed. Section 22 then directs certain allowances, and the allowance claimed is not within them. Section 34 then enacts what shall be the value of the property, and what allowances shall be made in respect of incumbrances and moneys laid out by the successor in substantial repairs or permanent improvements, "provided that upon any successor becoming entitled to real property, subject to any prior principal charge, an allowance shall be made to him *only* in respect of the yearly sums payable by way of interest or otherwise on such charge, as reducing the annual value pro tanto of such real property." It seems to me, therefore, that there is an express enactment, that in estimating the value of the property in respect of which this duty is to be paid, deductions ought not to be permitted of the expenses of the agent and receiver in the management of the property. I own I think it is a clear point, and that it cannot be that the mode of estimating this succession duty shall depend on the skill with which the conveyance is prepared by the conveyancer who has it in hand, and we must look (according to what is laid down in the House of Lords [*Lord Saltoun* v. *Advocate General of Scotland:* 3 Macq. 659] as the proper mode

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of looking at this act of parliament) at the substantial and general intention of the legislature as therein expressed. In my opinion, therefore, the Crown is entitled to our judgment.

BRAMWELL, B. I am of the same opinion. The question turns on s. 21 of the act, which says that the interest of every successor, except as therein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property. Now, supposing it stopped there, there can be no doubt that the interest of Lord Cowley would be an interest of the value of this property without the deduction claimed. But the section goes on with these words, "after making such allowances as are hereinafter directed"; and the only section thereby referred to is s. 22. Now, I am strongly inclined to think that s. 22 is of no operation, and that if it had not been there, still all the allowances for which it provides would have had to be made. However, whether it is necessary or not, all it extends to is an allowance for "all necessary outgoings." Now, it is argued that these words refer to all outgoings which the owner cannot help, but I do not think that is the true meaning. It means, not all such outgoings as the predecessor may have thought fit to expend, and which, therefore, in that sense are "necessary," but all such as are *intrinsically* necessary—such outgoings as it was not in the option of the predecessor to expend or not as he pleased. I concur in the reasoning of my Brother Watson in the judgment *In re Elwes* (1), and I think, therefore, that these expenses are not "necessary outgoings." But Mr. Bovill has ingeniously argued that the duty must be a charge on Lord Cowley's beneficial interest. But in sections 21 and 22 you do not find the words "beneficial interest," but "annual value of the property," to ascertain which the abatement of necessary outgoings is to be made.

Again, we are told this is a case of some hardship, because if the property instead of being left to trustees had been left to Lord Cowley directly, it would have been in his option to say whether he would have employed these agents or not, or whether he would have paid so much in any event as trustees have paid. But if this is an argument at all, it is met by the counter argument, that if we were to allow this deduction it would be in the

(1) 3 H. & N. 719, 723.

power of every testator by a mere contrivance to make his beneficial devisee liable to a less succession duty than he otherwise would be liable to as successor.

My judgment therefore is for the Crown, and it is based on the authority of *In re Elwes* (1), and on the consideration that the tax is to be assessed on the "annual value of property," making allowance for necessary outgoings, which I hold to mean outgoings intrinsically necessary, and not those which become necessary, owing to the arrangements which the testator thinks fit to adopt.

CHANNELL, B. I am of the same opinion. The foundation of our jurisdiction is the petition which has been presented on the part of Lord Cowley, which I consider raises only one question, viz., that of the quantum of assessment, that is, whether, according to the prayer of the petition, Lord Cowley is entitled to have, under s. 22 of the act, an allowance in respect of certain deductions he claims. Our answer must depend on the construction we are to place on s. 22. By s. 21, the assessment upon any property is directed to be made according to the value of an annuity, "equal to the annual value of such property after making such allowances as are hereinafter directed." In s. 22, we find the words "annual value of lands" again repeated, and then the section provides for certain deductions. We are, therefore, to look at the annual value after making certain allowances. We have two things then to ascertain: first, what is the annual value? secondly, what deductions are to be made? Now, it appears to me that neither s. 22, nor any of the other sections which were more slightly alluded to in the course of the argument, provide for the deductions that are now claimed. If, therefore, there were no authority on the point, I should come to that conclusion; but, I conceive, though there is a difference in point of fact between the present case and the case of *In re Elwes* (1), that in principle it is a decision in support of and warranting the judgment which the Court now pronounces. I am therefore of opinion that the Crown is entitled to our judgment.

Judgment for the Crown.

Attorney for the Crown: *Solicitor of Inland Revenue.*
Attorneys for the prosecution: *Coverdale & Co.*

(1) 3 H. & N. 719.

1866
May 26.

RYALLS *v.* LEADER AND OTHERS.

Defamation—Privileged communication—Protection to Report of Judicial Proceedings—Public Court—Registrar in Bankruptcy—Examination of Bankrupt in Gaol—24 & 25 *Vict. c.* 134, *ss.* 101, 102.

Proceedings held in gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, ss. 101, 102, upon the examination of a debtor in custody, are judicial and in a public court. A fair report, therefore, of those proceedings is protected.

DECLARATION on a libel published of the plaintiff by the defendants, in a newspaper called the "Sheffield and Rotherham Independent."

Plea. Not guilty. Issue thereon.

The libel complained of was contained in a report of an examination of a debtor in custody, held in York Castle, before the registrar of the Leeds Bankruptcy Court, pursuant to the provisions of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 101, 102; and it conveyed an imputation on the solvency of the plaintiff, who had been the debtor's partner. The cause was tried at the last Leeds spring assizes before Keating, J., when, the publication of the defamatory matter having been proved, the learned judge told the jury that "the libel was a privileged communication, and that the defendants were entitled to the verdict if the jury thought that the libel was a fair report of the proceedings before the registrar of the Court of Bankruptcy, and published without malice." The report contained no original comment on what passed. The jury found a verdict for the defendants.

The Bankruptcy Act, 1861, sec. 101, enacts that the commissioner or county court judge shall, in certain cases, make an order that the registrar in bankruptcy of the district, where the gaol is situate, shall attend at the gaol and examine the prisoners there touching their estate, effects, debts, dealings, and transactions. Notice of the order is to be given to the gaoler, and to the execution or detaining creditors, and the registrar is to have power to make an adjudication order. By sec. 102, when a prisoner refuses to appear, or to be sworn, or to answer all lawful questions of the registrar, detaining creditor, or any other creditor who shall be present, respecting his debts, or to make a full discovery of his estate, or to

sign his examination, the registrar may report the same to the Court, and the prisoner may be committed by the Court to prison for one month.

In Easter Term last, a rule nisi was obtained for a new trial on the ground that the learned judge had misdirected the jury in telling them that the libel was privileged, and the defendants entitled to a verdict if the report was fair and published without malice.

May 26. *Overend, Q.C.*, and *Cave*, shewed cause. This is a report, without any additions, of what occurred, and it is therefore "fair:" *Lewis* v. *Levy* (1); *Andrews* v. *Chapman* (2); and in order to entitle it to protection it is sufficient if the proceedings reported are judicial, if a knowledge of them is important to the public, and if those persons who are especially interested are entitled to admission. All these elements exist in the present case. The proceedings are judicial, for the registrar in bankruptcy exercises judicial functions. He has power to make an adjudication (Bankruptcy Act, 1861, s. 52), and to hold meetings generally for the prosecution of any bankruptcy (s. 58), and under s. 101, to examine a debtor in custody, "touching his estate, effects, dealings and transactions," to adjudicate him bankrupt, and if he prove contumacious, to make a report to the Court, which may result in his commitment to gaol (s. 102). Again, the knowledge of what passes at the examination is important to the public, who may be determined thereby whether or not to give the bankrupt credit. Lastly, the creditors have an opportunity of being present. They are entitled to notice of the order appointing the examination (s. 101). If the proceedings are judicial, it is not necessary that the court should be "public" in its widest sense. Thus, a report of proceedings before a judge at chambers, on an application under 5 & 6 Vict. c. 122, s. 42, to discharge a bankrupt out of custody, has been held protected. *Smith* v. *Scott.* (3)

[CHANNELL, B., referred to s. 54, whereby persons summoned are bound to attend before the registrar under pain of process of contempt, and are liable to the penalties of perjury for false swearing before him.]

(1) 27 L. J. (Q.B.) 282. (2) 3 C. & K. 286. (3) 2 C. & K. 580.

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Sections 50—58 all tend to prove that the registrar is a judicial officer.

Manisty, Q.C., *T. Jones*, and *J. Gully*, in support of the rule. First, this proceeding is not judicial. The registrar, though he is for some purposes, as when he is acting for the commissioner, a judicial officer, is not so when acting under ss. 101, 102 of the act. His functions then are ministerial. He has simply to inquire into the debtor's affairs, and cannot hear any evidence except that of the prisoner. The commissioner could not act under these sections if he wished. They are to be read separately and give a limited statutory power to the registrar, and to him alone for the purposes of inquiry. Secondly, the court is not "public." A "public court" means a court with an open door. Here the proceedings are conducted in the privacy of the gaol, and the fact that the detaining creditor may be present does not make the court public.

[BRAMWELL, B. Sec. 102 contemplates the possibility of *any creditor* being present.]

At any rate the persons present are confined to creditors. Thirdly, assuming the court to be public and the proceedings judicial, this report is still not protected, because the libel complained of was upon a third party and was not relevant to the inquiry. And even granting that it was relevant, no case has decided that proceedings in a court of justice implicating the reputation of a third person are under any circumstances privileged. In *Lewis* v. *Clement* (1) the question was left undecided, and in *Rex* v. *Carlile* (2) the principle that the whole of a fair report is not necessarily privileged was recognised.

POLLOCK, C.B. I am of opinion that my Brother Keating was right in his ruling. The complaint here made is that certain proceedings held by a registrar in bankruptcy in York Castle, and published by the defendant, were libellous on the plaintiff. The defence is, that the alleged libel was contained in a fair, correct, and bonâ fide report of what took place; and if these proceedings were in a public court, and the publication was fair, there is no foundation for this action. The only question then is, whether

(1) 3 B. & A. 702. (2) 3 B. & A. 167.

the registrar's court was under the circumstances a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair bonâ fide statement of proceedings there. The jury found that the publication of this report was bonâ fide, and the verdict, therefore, ought not to be set aside.

MARTIN, B. I am also of opinion that the learned judge was right in his direction. The case depends on whether there is a protection to a report of what occurred before a registrar in bankruptcy in examining a debtor in custody, and I have no doubt that there is such a protection. By ss. 50 and 51 of the Bankruptcy Act, 1861, it is enacted that the several courts exercising jurisdiction under the act, may take evidence in the modes specified, and that the commissioners may sit, in cases where they can do so without detriment to the public advantage, in chambers. The object of this enactment is that the matters which come before the court, may, as a rule, be discussed in public, the legislature being of opinion that only in matters where it could be done without detriment to the public advantage, the judge might sit at chambers. Then s. 100 provides for a great evil. Persons used to remain in prison voluntarily, thus, at the cost of an inconvenience to themselves, setting their creditors at defiance. It enacts that the gaoler is to make a monthly return of all prisoners in his custody for debt, and whether they are willing or not to petition the court of bankruptcy, and upon that (s. 101) the county court judge orders the registrar to attend at the gaol to examine the prisoners, notice being given to the execution creditor who detains, and to the gaoler. Then a power to adjudicate against every such prisoner, to grant him protection and to release him, is given; a power which ought to be exercised in public. Section 102 further enacts that where a prisoner refuses to answer the questions put to him, to discover his estate, or to sign his examination, the registrar shall report the same to the Court, and the Court may, therefore, commit such prisoner to gaol for a month. Can any one contend, that a matter for which one month's imprisonment may be given, is not one for the public to have reported to them? Is not an adjudication in such a matter properly to be held in public?

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I think that it is, and therefore that this report, being made bonâ fide, is protected.

BRAMWELL, B. I am of the same opinion. I think that this court was a public court. That is shewn from the terms of ss. 101 and 102. And even if it were not so, yet if the officer who holds it chooses to make it public, it would be public for this purpose. Then as to the point made, that nothing ought to be published affecting a third party, even when relevant to the inquiry, I think there is no such restriction. Those who are present hear all the evidence, relevant or irrelevant, and those who are absent, may, as far as I can see, have all that is said reported to them. The doctrine contended for is an entire novelty, because, if sound, every witness might bring an action against the newspaper publisher reporting his evidence, and call upon that publisher to prove all the libellous statements which might be contained in his examination or cross-examination. I do not think that there is any such qualification as that suggested, nor do I concur in the other suggestion made to us, viz., that what is *irrelevant* and libellous on a third person is not protected. There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy. My opinion is, that when once you establish that a court is a public court, a fair bonâ fide report of all that passes there may be published. Possibly this privilege is applied to courts of justice, because needless scandals are usually avoided in them. I am therefore of opinion that this rule should be discharged.

CHANNELL, B. I am of the same opinion. By s. 52 of the Bankruptcy Act, 1861, large powers are given to a registrar in bankruptcy to act judicially in court or in chambers, and those powers are further explained by ss. 58 and 61. Now it is not contended that if this proceeding had been held under these sections at chambers or in court, it would not have been a proceeding in a public court. But it is said that the examination having been held under ss. 101 and 102, the judicial and public character given to the registrar's proceedings under s. 52 and the following sections does not belong to this inquiry. In my opinion that is to put a narrow construction on the act. Section 100 enacts that the gaoler is to make a return of prisoners for debt in his custody, and

whether they are willing or refuse to petition the Court, and s. 101 directs the commissioner or county court judge to send the registrar to examine these prisoners touching their estate and effects, debts, dealings, and transactions. It is clear that the proceedings of the registrar at the gaol are on a somewhat different footing from those under the earlier sections. But that is no ground for holding that they are not of a judicial character, or—if that be necessary—that the court is not a public court. For s. 101 is followed by s. 102, enacting that when a prisoner refuses to answer the questions put, or to discover his estate, or to sign his examination, the Court, on the registrar's report, may sentence him to a month's imprisonment. Therefore, I think, looking at what the registrar is empowered to do in the gaol, that his proceedings are in a public court. But putting that consideration aside, I think that, supposing the proceeding is of a judicial character, then, if the judge leaves his court open to the parties interested, that is enough to give protection to a report of what occurs.

Then it is objected that this report reflects on the character of a third person, and that therefore it is not protected. I am, however, by no means prepared to concur in that proposition. Wherever the report is of something not wholly irrelevant, there at any rate the fact that it contains reflections on a third person, does not prevent the reporter from being protected. Now here the report was of a statement by the bankrupt as to his partner's position, and that is certainly not so irrelevant as to deprive the defendant of his protection. On all grounds therefore, I think the rule ought to be discharged.

Rule discharged.

Attorney for plaintiff: *A. Duncan.*

Attorneys for defendants: *Torr, Janeway, & Tagart.*

1866
May 29.

O'BRIEN v. BRODIE.

Debtor and creditor—Bankruptcy—Execution creditor—Bankruptcy Consolidation Act (12 & 13 *Vict. c.* 106) *s.* 184—*Interpleader Act* (1 *Wm.* 4, *c.* 58.)

Where an execution is levied by seizure, but the sale is suspended by an interpleader order, and before sale a petition for adjudication of bankruptcy is filed against the execution debtor, on which he is afterwards adjudged bankrupt, the case is within the Bankruptcy Consolidation Act (12 & 13 Vict. c. 106), s. 184, and the execution creditor is deprived of the benefit of his execution.

THE plaintiff in this action having obtained judgment for 182*l.*, issued on the 20th December a writ of fi. fa. against the defendant's goods, and the writ was on the same day executed by the seizure of goods on the defendant's premises. The goods so seized were claimed by a third person under a bill of sale, and the sheriff took out an interpleader summons.

Upon this summons an order was, on the 23rd December, made; directing that, on payment of 200*l.* into court by the claimant within seven days, or upon giving within the same time security to the satisfaction of one of the masters for payment of that sum, and upon payment of the sheriff's possession-money from the date of the order, the sheriff do withdraw from the possession of the goods seized; but that, in default of such payment or security within the time aforesaid, the sheriff do proceed to sell the goods, and pay the proceeds (after deducting expenses of sale, and possession money from the date of the order) into court, to abide further order; the order further directed an interpleader issue, in which the claimant should be plaintiff and the execution creditor defendant, the issue to be prepared and delivered by the plaintiff therein within five days. The terms of this order were not complied with by the claimant.

On the 30th December, the defendant filed his petition in bankruptcy, and was adjudged bankrupt, and on the same day the official assignee gave notice to the sheriff that he claimed the goods seized; but on an interpleader summons, taken out by the sheriff, an order was made by Martin, B., barring this claim.

On the 10th January, the sheriff sold the goods by auction; and after deducting expenses, fees, and rent, paid the balance of 51*l.* into court under the order of the 23rd December. Upon a summons

taken out by the plaintiff, an order was made by Martin, B., for payment out of court to him of the 51*l.*; but the learned judge suspended that order until another summons, taken out by the creditors' assignee of the defendant's estate, to set aside the order and for payment of the money to the assignee, should be disposed of. The latter summons was afterwards heard by Martin, B., who, thinking that the point had been decided by Willes, J., at chambers (1), referred the matter to the Court, and

Hannen, having obtained a rule accordingly on behalf of the assignee,

Holl shewed cause in the first instance. (2) The question turns

(1) See this case referred to; *post.*

(2) The sections of the Bankruptcy Acts referred to are as follows:—12 & 13 Vict. c. 106, s. 133. "All payments really and bonâ fide made by any bankrupt, or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt . . . . and all executions and attachments against the goods and chattels of every bankrupt bonâ fide levied by seizure and sale, before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to, or being paid by such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have been issued, had not at the time of such payment . . . or at the time of executing or levying such execution or attachment, or at the time of making sale thereunder, notice of any prior act of bankruptcy by him committed."

S. 184. "No creditor having security for his debt . . shall receive upon any such security . . . more than a rateable part of such debt, except in respect of any execution or extent served and levied by *seizure and sale* upon, or any mortgage or lien upon, any part of the property of such bankrupt before the fiat or the filing of a petition for adjudication of bankruptcy."

24 & 25 Vict. c. 134, s. 73. "If any execution shall be levied by *seizure and sale* of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: provided always, that, unless in the meantime a petition for the adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid."

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on 12 & 13 Vict. c. 106, s. 184, which deprives the creditor of the right to recover more than the rateable proportion of his debt out of an execution not levied by seizure and sale before the filing of the petition. That is the only section applicable, for s. 133, whereby notice of an act of bankruptcy received before execution of the writ by seizure and sale deprives the creditor of the benefit of the execution, refers only to notice of an act of bankruptcy committed prior to the seizure: *Edwards* v. *Scarsbrook* (1); whereas here the act of bankruptcy was the filing of the petition, which was subsequent to the seizure; and s. 73 of 24 & 25 Vict. c. 134, does not apply, since the adjudication is founded on the debtor's petition, and not on the execution as an act of bankruptcy.

With respect, then, to s. 184, it is true that *Hutton* v. *Cooper* (2), decides that the *seizure and sale* must both have occurred previous to the filing of the petition, in order to enable the creditor to retain the benefit of his execution; and *Young* v. *Roebuck* (3) follows that case. But the claim of the creditor in this case is founded on the fact that his action was suspended by the interpleader order, and that the 184th section was only intended to apply to the case of a writ executed at common law. If the creditor had been allowed to take his own course, and the sheriff to act under the writ, the goods would have been sold before the filing of the petition, or the creditor would have been entitled at once to take an assignment of them to himself in lieu of his debt. But the interpleader order suspended the proceedings, and took the goods out of the control of the sheriff. The sheriff therefore acted no longer under the writ, but under the order of the Court, and when the goods were at last sold they were sold under that order. The delay was occasioned for the benefit of the sheriff and of a third party who never ventured to prosecute his claim, and it cannot have been intended by the statute that the creditor should be prejudiced in such a case, but the rights of all parties must be determined with reference to the time when the order was made, and as if the sale had then taken place. As was said by Blackburn, J., in *Murray* v. *Arnold* (4), of money paid into court under a judge's order before bankruptcy,

(1) 3 B & S 280; 32 L. J. (Q.B.) 45.
(2) 6 Exch. 159; 20 L. J. (Ex.) 123.
(3) 2 H. & C. 296; 32 L. J. (Ex.) 260.
(4) 3 B. & S. 287; 32 L. J. (Q.B.) 11.

the goods were here "clogged with a trust" for the benefit of the creditor. [He also referred to a case of *Lloyd* v. *Parsons* (1), decided by Bramwell, B., at chambers, and followed by Willes, J., which was probably the case referred to at chambers by Martin, B.]

Hannen, in support of the rule. The 133rd section applies only as shewing the intention of the legislature to restrict the privileges of the execution creditor; s. 184 carries back the restriction to the filing of the petition, but s. 133 carries it back to a prior act of bankruptcy, unless both seizure and sale have been made before notice. The 73rd section of 24 & 25 Vict. c. 134, goes still farther, by making the levy by seizure and sale itself an act of bankruptcy, and taking away all benefit from the creditor, if an adjudication is obtained within fourteen days of the sale. But the real question turns on the construction of s. 184, the words of which are precise and unqualified, that the creditor is to receive no more than a rateable part of the debt, unless the execution has been levied by seizure *and sale*. The claim which delayed the sale, though made bonâ fide, may have been withdrawn, from the fact that the claimant knew that the goods were in the order and disposition of the bankrupt at the time of the seizure, which might under 24 & 25 Vict. c. 134, s. 73, have been treated as an act of bankruptcy. But however this may be, the contest is not between the creditor and the claimant, but between the execution creditor and the assignee representing all the creditors, and they cannot be deprived of the benefit given them by the words of the statute, by the conduct of a third person. Suppose, however, the goods had actually been sold on the day when the order was made, the assignee would, by 24 & 25 Vict. c. 134, s. 73, have been entitled to recover the proceeds from the creditor, as the adjudication of bankruptcy would have been within fourteen days of the sale.

[BRAMWELL, B. How do you deal with the argument that after the order the creditor had a lien of a different character from that given him by the execution?].

His rights are still rights under the writ; he is only restrained from realizing his security, and when the sale is ultimately made, it is made by the authority of the writ, not of the order, which did not give the power of selling, but only suspended it. The

(1) See note at end of case.

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case decided by Bramwell, B., was different, as it appears that the sale was completed, and the execution was therefore at an end before the bankruptcy, and therefore s. 184 did not apply.

POLLOCK, C.B. This is a contingency not provided for, but if we did not hold the assignee entitled, we should be legislating under the name of interpreting the statute. Taking the language of the statute as it stands, the clear result is, that if goods of a bankrupt are seized under a writ of execution, it avails the creditor nothing, provided a petition for adjudication of bankruptcy is filed before the levy is fulfilled by sale. Very specious, and even just and equitable, grounds were suggested to us, on which we were urged to hold that s. 184 does not apply to a case like this, where the ordinary action of the writ is suspended. But there are no words to justify us in coming to that conclusion. Doubtless the interference with the execution of the writ which the interpleader order caused, was not intended to produce this result; and probably, for the future, judges will be careful how they arrest the sheriff's action, and will leave him to sell, in order not to deprive the execution creditor of his advantage. But though I feel the force of Mr. Holl's suggestions, the language of the act is too strong to be got over or explained away. It provides distinctly that on seizure without sale before the petition, the execution creditor is to have no more than a rateable part of his debt, and the rule must therefore be made absolute to pay over the money in court to the assignee.

MARTIN, B. I am of the same opinion. During a portion of the argument I was under the impression that s. 73 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), had been relied on before me at chambers, but I believe that my memory was running upon another occasion. If I had to put a construction on the Interpleader Act (1 Will. 4, c. 58), and 12 & 13 Vict. c. 106, taken together, independently of any other statute, I should say that the interference of the judge under the former act took the case out of s. 184 of the latter, and that the creditor ceased to have a security for his debt within that section, the goods being then in custodiâ legis. But on s. 73 of the Bankruptcy Act, 1861, it is clear, that if the judge had said to the sheriff, "You have seized—sell and act as the law directs you," the assignee would by that section have

been entitled to the proceeds of the sale, inasmuch as the bankruptcy took place within fourteen days. Putting these two sections together, it is clear that the legislature intended that in such a case the general body of creditors should have the benefit of the goods, and if this is their intention, it is our duty to carry it out.

BRAMWELL, B. I am of the same opinion. The statute (12 & 13 Vict. c. 106, s. 184) says in substance, that no execution creditor shall receive upon his execution more than a rateable part of his debt, except in respect of an execution levied by seizure and sale before petition. Now, if the execution creditor receives this money, he will receive more than a rateable part of his debt, and the question therefore is, whether he will receive it in respect of an execution; for if so, inasmuch as that execution had not been levied by seizure and sale before the filing of the petition for adjudication, the case is within s. 184. But he certainly will, if he receives this money, receive it by virtue of an execution. Our judgment must therefore be against him; but I do not understand this to be inconsistent with the case decided by me at chambers. (1)

(1) This case was reported by *Holl* as follows :—

PARSONS AND ANOTHER v. LLOYD.

Goods were seized by the sheriff of Surrey under a fi. fa., which were claimed by a mortgagee. The sheriff interpleaded, and Martin, B., ordered a sale, and that the proceeds, after deducting the amount of the mortgagee's claim, should be paid to the execution creditor to the amount of his execution. The sheriff sold under this order; the debtor afterwards became bankrupt, and his assignees claimed the proceeds. The sheriff called on the assignees and execution creditor to interplead, and the parties having agreed to abide by the decision of Bramwell, B., his lordship gave judgment as follows :—

BRAMWELL, B. Though, as there is no appeal my reasons are unimportant, I wish the parties to see that I have duly considered the matter.

The execution creditor would be entitled, notwithstanding the bankruptcy, but for some special provision in the Bankruptcy Acts, because the assignee succeeded to the rights of the bankrupt as he possessed them, which was subject to the execution.

Then, is there any such special provision? I think not. I think s. 184 does not apply; the goods were not subject to a common law execution, which that section deals with.

The Common Law Procedure Act (1860) gives the execution creditor a lien in respect of which there is no special provision in the Bankruptcy Acts, unless it be the one in s. 184 as to liens. In this case the defendant might have given a second mortgage on these goods, which would have been perfectly valid. He did not, but Baron Martin, by his order, having full power, did. In short, the execution, as such, was at an end by this order, and the plaintiffs had a lien as security by other means, valid against a subsequent bankruptcy.

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CHANNELL, B. This is a point of great importance, and it is to be regretted that it arises in a case in which there is no appeal from our decision. But I am clearly of opinion that the rule must be made absolute. The question turns on the construction of s. 184 of the act of 1849, on which some light is thrown by s. 133. The words of the former section are extremely strong, and if no Interpleader Act had been passed, and no application been made to a judge, there could be no doubt that a plaintiff who had levied a fi. fa., but not sold, would be a creditor who had a security for his debt, and would, by s. 184, be deprived of his advantage. But Mr. Holl says that the fact that the judge has made an order, takes the creditor out of the class of creditors having security within s. 184. I cannot, however, put that construction on the statute, and I come to this conclusion on the words of the section itself; but although that would be my construction of the words taken alone, yet our decision is strongly fortified by the course of legislation, and by s. 73 of the Bankruptcy Act, 1861.

Rule absolute.

Attorneys for plaintiff: *Smith, Fordon, & Low.*
Attorneys for assignee: *Lawrance, Plews, & Boyer.*

May 30.

PEARSON *v.* PEARSON.

Debtor and Creditor—Trust Deed for benefit of Creditors—Registration—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134). *ss.* 192, 194, 197.

Section 197 of the Bankruptcy Act, 1861, applies only to deeds registered under ss. 192, 193, and not to deeds registered under s. 194.

Ex parte Morgan (1), followed.

DECLARATION for money payable, for money received, interest, and money due on accounts stated.

Plea. That after the accruing of the plaintiff's claim, the plaintiff was indebted to divers persons, and thereupon a deed was entered into between the plaintiff and R. J. Wright and R. Easton, as trustees on behalf of the thereunder signed creditors of the

(1) 32 L. J. (Bkr.) 15.

plaintiff, whereby the plaintiff conveyed all his estate and effects to the said trustees absolutely, to be by them applied and administered for the benefit of the plaintiff's creditors, in like manner as if the plaintiff had been at the date thereof duly adjudged bankrupt; and all things, &c., having happened to render the said deed binding on the creditors of the plaintiff, under the Bankruptcy Act, 1861, and to vest the debts and causes of action in the declaration mentioned in the said trustees, the said debts and causes of action became vested in the said trustees, for the benefit of the plaintiff's creditors as aforesaid.

Replication, that the said deed was registered under and by virtue of the 194th section of the Bankruptcy Act, 1861, and the same was not, under and according to the 192nd section of the said act, within twenty-eight days from the day of the execution of the said deed produced and left (having been first duly stamped) at the office of the chief registrar of the court of bankruptcy, for the purpose of being registered, and together with such deed there was not delivered to the said chief registrar, an affidavit by the plaintiff, or some person able to depose thereto, or a certificate by the said trustees or either of them, that a majority in number representing three fourths in value of the creditors of the defendant, whose debts amounted to 10*l.* and upwards, had, in writing, assented to and approved of the said deed, and stating the amount in value of the property and credit of the plaintiff comprised in such deed.

Demurrer and joinder.

Dowdeswell, in support of the demurrer. The causes of action are vested in the trustees under s. 197, which applies to deeds registered under s. 194, as well as to deeds registered under s. 192. (1)

(1) S. 192 of the Bankruptcy Act, 1861, contains, with regard to deeds of arrangement between a debtor and his creditors, the following, amongst other provisions:

"Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar for the purpose of being registered."

"Together with such deed or instrument, there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustees or trustee, that a majority in number,

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[MARTIN, B., referred to *Ex parte Morgan* (1), as shewing that s. 197 only applied to deeds made and registered under s. 192. He also referred to the judgment in *Ex parte Spyer* (2), as being to the same effect.]

These cases merely decide that s. 197 applies to deeds under s. 192. It does not follow that it may not also apply to deeds registered under s. 194. The words are from and after the registration of *every such deed.*

[MARTIN, B. Section 198, giving protection to the debtor, after notice of the filing, &c., of the deed, only applies to deeds under s. 192; per Lord Westbury, C., in *Ex parte Morgan.* (1)]

That section contains the words "after notice of the filing and

representing three fourths in value of the creditors of the debtor whose debts amount to 10*l.* or upwards, have, in writing, assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed."

S. 193 enacts, that the particulars of the deed, with a short statement of its nature and effect, shall be entered by the Chief Registrar in a book to be kept exclusively for the purposes of such registration; such entry to be made within forty-eight hours after the deed has been left with the Registrar, and a copy of such entry to be published, within four days of its being made, in the *London Gazette.*

S. 194 enacts, that "every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys, or covenants, or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors . . . . shall, within twenty-eight days from and after the execution thereof by such creditor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence."

S. 197 enacts, that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtors and creditors and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of, and be liable to, all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument and the creditors under the same shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy."

(1) 32 L. J. (Bkr.) 15.

(2) 32 L. J. (Bkr.) 62.

registration of such deed has been given *as aforesaid*," and there is no antecedent provision as to notice except in s. 192.

[BRAMWELL, B. The language of s. 197, as to the creditors, parties to such deed or who have assented thereto, or are bound thereby, seems to limit the application of the section to deeds under s. 192.]

The clauses are used disjunctively. If deeds under s. 192 had alone been contemplated, the word "creditors" would have been sufficient. By adding the words "or who have assented to, or are bound thereby," an intention is shewn to include deeds to which creditors have not assented, or by which they are not bound.

E. L. O'Malley, contrà, was not called on.

POLLOCK, C.B. The question in this case really is, whether section 194 of the Bankruptcy Act, 1861, is parenthetical, or whether it is to be considered as one of the series of sections with respect to deeds of arrangement. I am of opinion that it is inserted by way of parenthesis only, and to meet the circumstances mentioned by Lord Westbury in his judgments in *Ex parte Morgan*. (1) The opinion there expressed I regard as the true construction of the act. I therefore think this deed, not being registered in the mode prescribed by ss. 192 and 193, but merely under s. 194, did not transfer the debt sued for to the trustees. My judgment accordingly is for the plaintiff.

MARTIN, B. I am of the same opinion. It seems to me that section 194 is parenthetical only. It could not have been intended by the legislature that a debtor, by a deed to which none of his creditors had assented, and of which they might be entirely ignorant, should be able to transfer the whole of his property to trustees. I think, moreover, that the judgments of the Lord Chancellor, in *Ex parte Morgan* (1), and *Ex parte Spyer* (2), rule this case: and to the same effect is his judgment in *Ex parte Smith re Smith* (3), where a case which had been before me at chambers was under his consideration. It is contended indeed, that there is a difference between ss. 197 and 198, because the latter contains the words "after notice of the filing and registration of such deed as aforesaid," and s. 192 is the only preceding section requiring

(1) 32 L. J. (Bkr.) 15, 17. (2) 32 L. J. (Bkr.) 62. (3) 10 L. T. (N.S.) 551, 386.

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such a notice. It is true there are no similar words in s. 197, but there, as in s. 198, the expression used is, "every such deed," and these words, Lord Westbury thought, applied only to deeds registered in the manner pointed out by s. 192.

BRAMWELL, B. I am of the same opinion. No doubt, according to our construction, the words "every such deed" require to be read as "every such deed as in s. 192 mentioned." That is an obvious primâ facie objection. But it would manifestly be a most extraordinary thing if a debtor might execute a deed, transferring his whole property to a trustee of his own choice, without the knowledge or assent of any of his creditors. Now, s. 198 gives protection to the debtor, "after notice of the filing and registration of such deed has been given as aforesaid;" and it is admitted that this section does not include deeds registered under s. 194. If, therefore, we must interpolate some such words as I have mentioned there, no sufficient reason has been given why we should not do so in s. 197, to obviate the absurd consequences which would otherwise ensue. Again, s. 197 speaks of the creditors "parties to such deed, or who have assented thereto, or are bound thereby," and this phraseology is not consistent with precise speaking, if Mr. Dowdeswell's construction is the true one. The section should then have run as follows:—"From and after the registration, &c., as well when there are creditors parties to such deed, or who have assented thereto, or are bound thereby, *as when there are no such parties.*" The reason of the thing, therefore, the admitted necessity of adding the words in s. 198, which must upon our construction be added here, and the inaccuracy of expression in the section to which I have just referred, assuming Mr. Dowdeswell's contention to be well founded, concur in making me think, that the provisions of s. 197, apply only to deeds entered into in conformity with the provisions of s 192.

CHANNELL, B. I agree with the rest of the Court. The replication alleges that the deed in the plea mentioned was registered under s. 194 of the Bankruptcy Act, 1861, but was not, according to s. 192, left at the Registrar's office within twenty-eight days, and that there was not delivered with it an affidavit or certificate in compliance with that section. Now, in this case, whilst every-

thing has been done to register the deed under s. 194, the formalities prescribed by s. 192 have not been complied with, and the argument of the defendant is, that it is enough if the deed is registered under s. 194. But on looking at the act it appears that s. 192, contemplates a certain deed, and also enjoins a certain mode of registration. Section 193 completes the directions for registration. Then comes s. 194, which I consider parenthetical. Section 197 gives effect to the "registration of every such deed, in manner aforesaid," and I apprehend that though s. 194 alludes to other deeds, we must go back to ss. 192 and 193, to see what deeds s. 197 refers to. But I do not base my decision on the necessity of a deed being valid under s. 192, in order to its being a deed to which s. 197 applies; but on the necessity for its being registered in manner aforesaid, that is, in ss. 192 and 193 aforesaid.

Judgment for the plaintiff.

Attorneys for plaintiff: *Turner & Turner.*
Attorneys for defendant: *Cree & Last.*

HODGSON *v.* SIDNEY.

June 12.

Parties to actions—Bankruptcy—Action for false representation—Pecuniary loss —Special damage—Primary cause of action.

To a declaration for a false representation, whereby the plaintiff was induced to pay 2000*l.*, and "sustained great loss, and became and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant, except as to the claim in respect of the adjudication in bankruptcy and the remainder of the personal damage alleged, pleaded that before action the plaintiff had been adjudicated bankrupt, that the loss sustained was a pecuniary loss, and that the right to sue for it passed to his assignees:—

Held, that the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignees, and therefore that the plea was a good answer to the whole declaration, and might have been so pleaded.

DECLARATION for a false representation whereby the plaintiff was induced to make certain advances and payments of money to one William Sidney to the amount of 2000*l.* on account of the manufacture of certain wine for exportation, "whereby and by

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reason of the said false and fraudulent representation the plaintiff has sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit."

Second plea. Except as to the claim in respect of the plaintiff's becoming and being adjudicated a bankrupt, and suffering the alleged personal annoyance, and being put to the alleged trouble and inconvenience, and being injured in character and credit, that the said loss which the plaintiff sustained, as in the declaration alleged, was a pecuniary loss, to wit, the loss of the moneys which he so advanced and paid, as in the declaration mentioned; that after the accruing of the supposed cause of action, and before this suit, the plaintiff was adjudicated bankrupt, and thereupon an official assignee was duly appointed, and all things were done, &c., to give validity to the said adjudication and appointment, and to cause the estate of the plaintiff, including the cause of action in the declaration mentioned, and herein pleaded to, to vest, and the same did vest, in the said official assignee before this suit, and has not revested in the plaintiff.

Demurrer and joinder.

May 30. *Lumley Smith*, in support of the demurrer. Damage resulting from a tort does not pass to the assignees; *Howard* v. *Crowther* (1); *Brewer* v. *Dew*. (2)

[BRAMWELL, B. The plaintiff's only cause of action is a direct pecuniary loss. The claim as to the adjudication is clearly too remote.]

Excluding that claim, there is still special damage in addition to the pecuniary loss, in respect of which the bankrupt is entitled to recover. He has suffered inconvenience for which the jury might choose to give him vindictive damages.

Field, *Q.C.*, contrâ. The cause of action here is *primarily* a diminution of the personal estate by 2000*l*., and it therefore passes to the assignees, although the pecuniary loss incurred may have produced personal inconvenience to the bankrupt himself: *Drake* v. *Beckham* (3); *Wetherell* v. *Julius*. (4)

(1) 8 M. & W. 601.
(2) 11 M. & W. 625.
(3) 11 M. & W. 315; 2 H. L. C. 579.
(4) 10 C. B. 267.

[MARTIN, B. By the exception in the plea the defendant shews that some part of the cause of action passes to the assignees, and some part remains in the bankrupt. Can you split a cause of action in this manner?]

The plea is pleaded in the form indicated as correct in such a case, by Lord Abinger, C.B., and Rolfe, B., in *Brewer* v. *Dew.* (1) The cause of action is not really split here, for no damage capable of being recovered is alleged except the actual pecuniary loss.

Lumley Smith, in reply. There has been an independent personal wrong suffered by the bankrupt for which he alone can sue, *Rogers* v. *Spence* (2): and the pecuniary loss incident to the commission of the tort cannot be dissociated from the rest of the cause of action and separately pleaded to.

Cur. adv. vult.

June 12. The judgment of the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.), was delivered by

MARTIN, B. This was an action for false representation, and the plaintiff alleges that by reason thereof he "has sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit." The plea which is pleaded to the whole declaration, "except as to the claim in respect of the plaintiff's becoming and being adjudicated bankrupt, and suffering the alleged personal annoyance, and being put to the alleged trouble and inconvenience, and being injured in character and credit," states that the loss sued for was a pecuniary loss, that the plaintiff became a bankrupt before this action, and, therefore, that the cause of action vested in his assignees: and to this plea there was a demurrer. We are of opinion that the plea is good on the ground that the exception is of no effect. The plea may be taken as if pleaded to the whole declaration; and, therefore, as we are of opinion that the pecuniary damage claimed and alone capable of being recovered passes to the assignees, our judgment is for the defendant.

BRAMWELL, B. I only wish to add that, assuming that there was special damage recoverable, I do not think that the cause of

(1) 11 M. & W. 625, 629, 630. (2) 12 Cl. & F. 700.

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action can remain partly in the bankrupt to recover such damage, and partly can pass to the assignees to recover the pecuniary and ordinary damage. If two several torts had been committed there would be no reason why the bankrupt should not recover in respect of one, and the assignees in respect of the other. But where, as in this case, there is but one single cause of action resulting in direct pecuniary and in special damage, the bankrupt cannot say that enough of it remains in him to enable him to recover the special damage.

Judgment for the defendant.

Attorney for plaintiff: *A. Sidney.*
Attorney for defendant: *W. T. Elliot.*

June 12.

VANDENBERGH *v.* SPOONER.

Contract of sale—Statute of Frauds (29 *Car.* 2, *c.* 3,) *s.* 17—*Names of parties.*

In order to make a valid note or memorandum of a contract for the sale of goods within the Statute of Frauds, s. 17, the names of the parties to the contract must appear upon the document as such parties.

A., the purchaser from B. of goods above the value of 10*l.*, signed a document in the following terms:—"A. agrees to buy the whole of the lots of marble purchased by B., now lying at Lyme Cobb, at 1*s.* per foot":—

Held, that B.'s name not being mentioned as seller, the document was not a note or memorandum of the contract within the Statute of Frauds, s. 17.

THIS was an action for goods bargained and sold, tried before Bramwell, B., at the sittings at Westminster, in last Hilary Term. The plaintiff had purchased at a sale of wreck a quantity of marble; this the defendant agreed to buy, but afterwards repudiated his bargain, and refused payment. The value of the goods was above 10*l.*, and the only note or memorandum of the contract in writing, signed by the defendant, was as follows: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1*s.* per foot. (Signed) D. Spooner."

Evidence was also given to the effect that, after the defendant had signed this document, he wrote out what he alleged to be a copy of it, which at his request the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J.

Vandenbergh agrees to sell to W. D. Spooner the several lots of marble purchased by him now lying at Lyme, at one shilling the cubic foot, and a bill at one month, (Signed) Julius Vandenbergh." The jury, however, were of opinion that the first document stated the contract actually made, and found a verdict for the plaintiff for 35*l.*; leave being reserved to the defendant to move to enter a nonsuit, on the ground (amongst others) that there was no sufficient note or memorandum of the contract within the Statute of Frauds.

Karslake, Q.C., having obtained a rule accordingly,

May 22. *Huddleston, Q.C.*, and *Hannen*, shewed cause. To make a document a sufficient note or memorandum of a contract within the Statute of Frauds, it is only necessary that it should shew with reasonable clearness and certainty the parties to, and the subject matter of, the contract, and should be signed by the party to be charged. *Bailey* v. *Sweeting* (1); *Sarl* v. *Bourdillon*. (2) Now in this case it is clear that the plaintiff's name is mentioned, and the only question is, whether from that mention it can be inferred that he is the seller. The case is, therefore, not within the decision in *Williams* v. *Lake* (3), where the plaintiff was not mentioned at all in the guarantee, and the guarantee was, in fact, intended to be given to a different person; in substance that case was an attempt to make an ordinary contract transferable. The words, however, there used by Hill, J., are applicable; it is sufficient if the essentials of the contract appear by a *reasonable construction* of the document. It is a reasonable construction of this document, that Vandenbergh is the seller; for being stated in it to have purchased the marble, he must be presumed still to be the owner of it, and, as the only person entitled to sell, to be the person actually selling.

[BRAMWELL, B. Suppose a contract were signed in this form,—I agree to give 100*l.* for the brown horse, bred by A. B., would that be evidence of a contract with A. B. to buy the horse?]

No, because from the nature of the subject matter, that description would be given of a horse not with any reference to its present

(1) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.
(2) 1 C. B. (N.S.) 188; 26 L. J. (C.P.) 78.
(3) 2 E. & B. 349; 29 L. J. (Q.B.) 1.

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owner, but as an indication of its probable qualities, but there is no such reason for describing goods by reference to their purchaser. It may be inferred, therefore, by a reasonable intendment, that the person described as having purchased the goods is the seller.

[BRAMWELL, B. If the word *intendment* were substituted for *construction* in the judgment of Hill, J., it would be more in your favour; it may be shrewdly guessed that the plaintiff was the purchaser, but that is conjecture and not construction.]

All that is meant by Hill, J., is that you must be able fairly to collect the essentials of the contract from the document. A bill given by A., headed "A. to B.," and enumerating the goods, and stating the price, would satisfy the statute, and would bind A., if A.'s name had been written or printed by him or by his authority. But if it does not appear from the document itself who is the seller, the surrounding circumstances may be looked at to shew that the seller is the person mentioned in it, and a conclusive circumstance here is, the paper signed by the plaintiff; *Macdonald* v. *Longbottom*. (1)

Karslake, Q.C., and *Kingdon*, in support of the rule. It is clear that the plaintiff is not mentioned *as seller* in the document, and it is only by importing knowledge of the circumstances that the inference that he is seller can be arrived at. But the case cited is no authority for ascertaining the seller by extrinsic evidence, where no one is named as seller, but only for identifying the person or the thing named or described with the person or thing intended. Further, the document signed by the plaintiff is no part of the document signed by the defendant, nor is referred to in it, and the jury have found that it does not represent the real contract: *Boydell* v. *Drummond*. (2) The admission of extrinsic evidence could not be justified on any principle, that would not justify admitting proof by parol of the whole contract, of which the statute requires written evidence; the circumstance required is the very circumstance that the plaintiff was a party to the contract. The contention of the other side would as justly apply to shewing the seller when his name was not mentioned at all in the document, for here the plaintiff is not mentioned *as seller*, but his name is introduced as part of the description of the goods. It would be

(1) 1 E. & E. 987; 29 L. J. (Q.B.) 256. (2) 11 East. 142.

equally open to John Smith to prove that he was the seller, and there would be nothing in the document to contradict it. The case is therefore entirely within the decision in *Champion* v. *Plummer* (1); and the words there used by Mansfield, C.J. apply, "How can that be said to be a contract, or a memorandum of a contract, which does not state who are the contracting parties?" They also cited Blackburn, Contr. of Sale, p. 54.

Cur. adv. vult.

June 12. The judgment of the Court (Pollock, C.B., Martin, Bramwell and Channell, BB.), was delivered by

BRAMWELL, B. The question we have had to consider in this case is, whether the document relied upon by the plaintiff was a sufficient note or memorandum in writing to bind the defendant under s. 17 of the Statute of Frauds. The document was signed by the defendant, and was in the following terms: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1*s.* per foot." Can the essentials of the contract be collected from this document by means of a fair construction or reasonable intendment? We have come to the conclusion that they cannot, inasmuch as the seller's name *as seller* is not mentioned in it, but occurs only as part of the description of the goods.

MARTIN, B. I am not well satisfied as to what is the real meaning of the document, but I am not prepared to differ from the rest of the Court.

Rule absolute.

Attorneys for plaintiff: *Trehern, Whites, & Renard.*
Attorneys for defendant: *Benbow, Tucker, & Saltwell.*

(1) 1 B. & P. (N.R.) 252, 254.

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June 2.

BAINES and Another *v.* EWING.

Principal and Agent — Extent of Authority—Secret Limit — Underwriter— Marine Insurance—Custom at Liverpool—Divisibility of Claim.

22 R CP 21.
6 QBD 705

The defendant authorized an insurance broker at Liverpool to underwrit policies of marine insurance in his name and on his behalf, the risk not to exceed 100*l.* by any one vessel. The broker, acting in excess of this authority, and without the knowledge of the defendant, underwrote a policy for the plaintiff for 150*l.* The plaintiff was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that in nearly all cases there is a limit of some sort, which remains undisclosed to third persons, imposed on brokers by their principals. In an action upon the policy :—

Held, 1st, that the defendant was not liable for the whole amount underwritten, the broker having exceeded his authority; and, 2ndly, that the contract whereon the action was founded was not capable of division, and therefore that the defendant was not liable to the extent of 100*l.*

Declaration in the ordinary form, and containing the customary averments, on a policy of insurance on the ship *City of Brisbane*, subscribed by the defendant for 150*l.*, claiming for a total loss.

Plea. Denial of the subscription of the policy.

At the trial before Lush, J., at the last Liverpool spring assizes, the following facts were proved :—The plaintiffs are shipowners at Liverpool, carrying on business under the style of James Baines & Company, and the defendant, who usually resides in England, is a partner in the firm of Ewing & Company, of Calcutta. In July, 1861, he gave an authority in the following form to Messrs. North, Ewing, & Company, of Liverpool, insurance brokers, to underwrite policies on his behalf :—

"I hereby authorize you, in my name, and on my behalf, to underwrite policies of insurance against marine risks not exceeding 100*l.* by any one vessel; and I authorize you to hold and return all premiums received for me as a fund to answer losses, it being understood that all accounts between us are to be settled according to the usual course of transacting business between underwriter and broker as customary in Liverpool, and separate deposit account kept with bank; also to reinsure risks and to adjust and sign off all losses, averages, or returns, and

to give the usual credit note and make payment of the same on my account; also to dispute any claims which you may consider illegal or unjust, and to settle the same by arbitration or otherwise. Accounts to be rendered half yearly."

In pursuance of the authority thus given to them, and acting upon the ordinary rules of insurance business, the brokers laid Mr. Ewing's name before the Underwriters' Association of Liverpool, as the name of a person desirous of underwriting policies. The Association approved the defendant's name, which was thereupon entered upon their books, and the brokers commenced subscribing policies on various ships in his name according to the custom of the Liverpool trade, the custom being for brokers not to send policies to their principals, but to sign their principals' names to the policies. It is well known in Liverpool that in almost all cases, if not in all, a limit is put to the amount for which a broker can sign his principal's name, but the limit is a secret one, and remains undisclosed to the assured.

In October, 1862, whilst the authority given to North, Ewing, & Company, was still in force, that firm subscribed a policy on the *City of Brisbane*, a ship belonging to the plaintiffs, in the defendant's name, for 150*l*., thus exceeding the limit fixed upon between the defendant and themselves by 50*l*. The plaintiffs did not know of the limit imposed on the brokers by the defendant, nor that it had been exceeded. The defendant, on learning what had been done, did not ratify the policy. The premium had remained throughout in the hands of the brokers. On several other occasions the brokers had subscribed for amounts beyond the limit, but never, either in this case or any other, to the knowledge of the defendant.

A total loss under the policy being admitted, a verdict was by arrangement entered for the plaintiffs for 150*l*., and leave was reserved to set it aside and enter a nonsuit or verdict for the defendant, or to reduce the damages to 100*l*., or any smaller sum.

In Easter Term last, *Edward James, Q.C.*, obtained a rule nisi, pursuant to leave reserved, on the ground that there was no evidence of authority given by the defendant to underwrite the policy.

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Brett, Q.C., and *Quain*, shewed cause. First, the defendant held out his brokers as general agents to underwrite policies, and the plaintiffs had a right to assume that the authority would be properly exercised in all matters within the scope of the brokers' employment. The brokers were not agents to underwrite one particular policy, but all policies they might in their discretion think proper to underwrite. They were therefore "general agents" for a particular purpose: Story on Agency, 4th ed. s. 126, Smith on Mercantile Law, 7th ed. p. 128; and no secret limitation of their authority could affect the rights of a third party to whom the limitation was unknown: Story on Agency, 4th ed. s. 127, n., Duer on Marine Insurance, vol. ii. lect. xii. ss. 49, 50.

[BRAMWELL, B. Apart from the existence of a custom at Liverpool to limit the authority of a broker, I should certainly have thought that there had been a holding out of these brokers by the defendant as his agents to underwrite policies without any particular limit.]

The custom does not alter the principle that a private limitation shall not prejudice third persons. Even without the existence of the custom, a person might be certain that there was *some* limit which the brokers would be bound not to transgress. The case is analogous to that of a factor who has a general authority to sell his principal's goods, but who is notoriously limited by private instructions not to sell for less than a particular sum. Suppose he transgresses these instructions, the buyer is not prejudiced.

[BRAMWELL, B. I should be disposed to doubt that proposition. Is there any authority for it?]

In Story on Agency, 4th ed. s. 131, it is said that if factors who possess a general authority to sell, violate their private instructions, the principal is none the less bound. The practical inconvenience of holding the contrary would be very great. In insurance business, for example, an underwriter would have to produce his authority to every person seeking to insure who could not otherwise be certain that the underwriter was acting within the proper limit.

Secondly. The plaintiffs are at least entitled to a verdict for 100*l*. Where an agent exceeds his authority after pursuing it

to a certain point, his principal is liable up to that point. In Co. Litt. 258 a, it is laid down that, "where a man doth that which he is authorized to do and more, then it is good for that which is warranted and void for the rest."

[The Court having intimated a clear opinion that the contract in this case was indivisible, and that the plaintiffs were entitled under it to recover all or nothing, the argument on the second point was not further pressed.]

Edward James, Q.C., Mellish, Q.C., and *H. T. Holland*, in support of the rule, were not called upon.

MARTIN, B. I am opinion that this rule should be made absolute. The contract declared on, was made by an agent for his principal, and it was therefore necessary to prove his authority. Now its terms are as follows: "I hereby authorize you, in my name and on my behalf to underwrite policies of insurance against marine risks not exceeding 100*l.* by any one vessel"; and that document is produced to prove the declaration which alleges that a policy was subscribed for 150*l.* If the case had stood there the agent would certainly have been unauthorized. But then it is said that we must hold him to have had authority because of the exigencies and course of business at Liverpool. It appears, however, that it was well known there that a limit is almost always, if not always, put to the amount for which a broker may underwrite. The limit in a particular case is known, it is true, only to the principal and the broker; but still every one has notice that there is a limit of some sort; and I think, therefore, it would be impossible to hold a person liable to an unlimited extent, or to an extent beyond the fixed limit.

BRAMWELL, B. I am of the same opinion. The actual terms of the authority cannot in this case be relied on, and the plaintiffs therefore have to rely on the fact of the defendant having, as it is alleged, held out the broker as his agent generally to sign policies. But in fact he only held him out as having the ordinary authority of a Liverpool broker, and when we ask what that authority is, the answer is unfavourable to the plaintiffs' claim. It is not necessary to consider what the result would be if there were no limitation notoriously fixed between the principal and the agent. With regard

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to the passage cited from Story on Agency, 4th ed. s. 131, the case there referred to by no means warrants the general proposition laid down, and I doubt exceedingly whether the principal of a factor would be liable in a case where the factor sold in spite of a particular authority to sell at a particular price. Then it is said that business could not be carried on if, before accepting a policy for a certain amount, the assured were always to insist on the agent underwriting it shewing his authority to sign for that amount. The answer to that objection is, that, as a rule, reliance may be placed on the honesty of the broker and the solvency of the principal. It is unusual in business transactions for agents to assume an authority they do not possess.

CHANNELL, B. I am of the same opinion. The material question for our decision is, whether the defendant is liable on this contract. If we look only at the express authority it not only does not confer, it even negatives, any authority to sign a policy for so much as 150*l*. But then it is said the authority was given to a "general" agent and cannot be limited by secret instructions as to amount. Now I agree that to be a general agent a man need not be an agent for all purposes. He may be a general agent for a special purpose, for example, an agent to sign all bills of exchange. But here it is well understood that there is some limit fixed beyond which a broker may not underwrite policies, and that being so, the broker is not, in my opinion, a general agent in the sense contended for. I think, therefore, the rule should be made absolute.

Rule absolute.

Attorneys for plaintiff: *Westall & Roberts.*
Attorneys for defendant: *Uptons, Johnson, & Upton.*

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June 21.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed under s.* 192—*Reasonableness—Verification of Debts under penalty—Forfeiture of Debt.*

2 Ch 370

A deed under the Bankruptcy Act, 1861, s. 192, absolutely releasing the debtor, empowered the trustees to require any creditor to verify his debt by solemn declaration; and provided that, in the event of any creditor, if in Great Britain or Ireland, failing to verify his debt for two calendar months after such requisition, he should lose all benefit under the deed, and his dividends should fall into the general estate for the benefit of creditors not making similar default:—

Held, that the provision as to forfeiture was unreasonable, and the deed therefore bad.

DECLARATION for goods sold.

Plea, setting out a deed under the Bankruptcy Act, 1861, s. 192, dated 24th November, 1864, and made between the defendant of the first part, trustees of the second part, and "the several persons whose names, or the names of whose firms are written in the schedule hereunder written, and whose seals, or the seals of individuals, members or member or agent of whose firms are affixed, being respectively creditors of the said debtor upon or against whom these presents should become valid, effectual, and binding by reason of the provisions of the Bankruptcy Act, 1861, as to trust deeds for the benefit of creditors, or otherwise howsoever, of the third part." By the deed the debtor, after reciting that he had become liable to his creditors in divers sums of money, which sums or some part thereof were set opposite to their names respectively in the schedule, assigned all his property to the trustees upon trust to realize the same, and out of the proceeds, after payment of expenses, to pay rateably, administering the assets as in bankruptcy (except where the contrary was provided for), "to and amongst all the parties hereto of the third part, including themselves the said trustees and their partners (if any) so far as they may be creditors as aforesaid, and including *all the creditors* of the said debtor, the several debts and sums due to such creditors respectively." The deed also provided that, "it shall be lawful for the said trustees, at the expense of the estate, to require the amount of any debt of any of the creditors to be

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verified by solemn declaration; and in the event of any such creditors, if in Great Britain or Ireland, failing so to verify such debt for two calendar months after such requisition, such creditors or creditor shall lose all benefit, dividends, and advantage to be derived from these presents, and thereupon such last mentioned dividends shall fall into the general estate for the benefit of the creditors not making similar default." There was an absolute release of the debtor by "all the said creditors"; and it was declared that the deed was meant to be binding on non-executing creditors under the Bankruptcy Act, 1861.

Replication, that the plaintiffs never executed or assented, or became parties to the indenture in the plea mentioned, nor were they, or their firm, or any agent of theirs, or their debt, named or mentioned in the schedule to the deed.

Demurrer and joinder.

June 4. *J. M. Howard* (*Abbott* with him), in support of the demurrer. The objections made to the deed will be two, first, that it does not provide for all the creditors; second, that the clause providing for the forfeiture of debts in default of verification is unreasonable. But the objections are untenable. First, the true construction of the words describing the parties of the third part, will make them include all creditors who would be bound by a valid deed under s. 192; the words "or otherwise howsoever," are surplusage. The trust for creditors also specifically purports to be for *all the creditors*, and it is under this trust that the whole benefit of the deed is to be derived. Second, as to the clause requiring a verification of debts, a provision in a somewhat similar form occurred and was disallowed in *Leigh* v. *Pendlebury* (1); but in *Coles* v. *Turner* (2), although *Leigh* v. *Pendlebury* was not expressly overruled, it was held that a provision that the creditor shall prove his debt by statutory declaration or otherwise as the trustee may think fit, was reasonable. It is true that no penalty was imposed there, but if it is established that verification may be required, it must be allowable to fix some time within which the proof must be made, so as to permit of the debtor getting

(1) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.
(2) Law Rep. 1 C. P. 373.

his discharge; and to make the provision effective, it is necessary to affix some penalties to non-performance of the condition. The only question therefore is, whether the time and the penalty are reasonable, and it is submitted that they are.

[POLLOCK, C.B. The rule can only be reasonable if it is reasonable in every case. No provision is made for cases of accidental omission, or of incapacity to prove; and while the creditors within the United Kingdom are barred, there is no limit fixed to the proof of creditors resident abroad. I doubt, moreover, the power of the majority of creditors to impose a penalty on non-compliance with the terms of the deed.]

Failing to verify may be taken to mean failing to verify without reasonable excuse; and *Scott* v. *Berry* (1) shews that, if you do the best you can for all the creditors, the deed is not bad because you do more for some than for others.

Macnamara, for the plaintiff. First, the deed is unequal. As to assenting creditors, the debtor admits them to be creditors for the sums set against their names in the schedule; non-assenting creditors must prove their debts.

[MARTIN, B. The trustees are trustees for all the creditors, and as to any of them they may require proof, not on behalf of the debtor only, but on behalf of the rest of the creditors.]

The forfeiture of the debt is unreasonable; no such penalty is attached to neglect to prove in bankruptcy, where the creditor may come in and prove at any time, not disturbing previous dividends.

[MARTIN, B. It was a common provision in the old composition deeds; see Forsyth on Comp. Deeds, 1st ed. p. 175. (2)]

(1) 3 H. & C. 966; 34 L. J. (Ex.) 193.

(2) The clause is as follows:—"It is hereby further agreed and declared between and by the said parties to these presents, that any of them, the said several persons, parties hereto of the third part, shall and will at any time, if called upon so to do by the said E. F. and G. H. (the trustees), or the survivor of them, or the executors or administrators of such survivor, make a solemn declaration before a magistrate or master in chancery of the truth and justice of the debt claimed by them respectively, or their or any of their partner or partners, before he or they shall be entitled to claim any dividend or benefit under these presents in respect of such debt; and that in the event of any such person, after being so called upon, refusing or neglecting to make such declaration as aforesaid, such person shall lose all dividends,

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Those deeds, however, were only binding on persons who signed; here the provision is to bind third parties, and the plaintiffs are in that position. The provision as to proof is itself unequal, as favouring creditors resident abroad; and it is further unequal, inasmuch as the trustees are themselves creditors, and whilst they are able to dispense with verification of their own debts, they have a motive to require every other creditor to verify. But it is fatal to the deed that this provision, objectionable in itself, is enforced by a penalty; the authority of *Leigh* v. *Pendlebury* (1) is against such a penal clause; and in *Coles* v. *Turner* (2) the Court of Exchequer Chamber carefully avoids impeaching the decision on that point, although it allows the clause requiring verification as reasonable. Secondly, the deed is unequal, because its benefits are confined to those who execute it; they alone can sue on the covenants: *Davis* v. *Raphael.* (3) He also cited *Lyne* v. *Wyatt.* (4)

[MARTIN, B. The scope of the deed is the distribution of the property assigned.

CHANNELL, B. If the deed is not to be read as providing for all the creditors, then the words "all the said creditors" in the release do not include the plaintiffs.]

J. M. Howard, in reply.

The Court intimated that they thought the deed was for the benefit of all the creditors; as to the other point,

Cur. adv. vult.

June 12. The following judgments were delivered:

CHANNELL, B. Upon the demurrer in this case the question for us was, whether the deed set up by the plea was valid under the Bankruptcy Act, 1861. It was sought to invalidate it on the ground that it contained a clause, whereby the trustees might require a creditor to verify his debt within a certain time by

benefit, and advantage to be derived from, or otherwise claimed under, these presents, anything herein contained to the contrary notwithstanding." Forsyth on Composition Deeds, 1st edition, (1841), p. 175. There is a similar clause as to referring disputed debts to arbitration (p. 189), which is retained in the edition of 1856 (3rd edition, p. 262).

(1) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(2) Law Rep. 1 C. P. 373.

(3) 11 Jur. (N.S.) 140.

(4) 18 C. B. (N.S.) 593; 34 L. J. (C.P.) 179.

solemn declaration, under pain of otherwise forfeiting the composition on it provided by the deed. The stipulation in the deed involves two matters; first, what a creditor is to do; second, the consequence of his not doing it. As to the first matter, I think it is not unreasonable to require from a creditor a solemn declaration, which may be taken as a substitute for the affidavit required in bankruptcy; the trustees would have no right to object to its sufficiency, if it is good in point of form. But the deed goes on to provide that, unless a creditor makes this declaration within the time specified, he is to lose all the benefit he would otherwise have obtained under the deed. This amounts to an express provision that his debt is to that extent to be forfeited; and in my opinion such a provision is unreasonable, and therefore makes the deed not binding on non-assenting creditors, amongst whom are the plaintiffs.

BRAMWELL, B. I am of the same opinion, and for the same reasons.

MARTIN, B. I am not prepared to agree with the rest of the Court. I find that this very clause was a common one in old composition deeds, of which forms are given in the appendix to Forsyth on Composition Deeds; and but for the decisions which have been arrived at on deeds under the Bankruptcy Act, 1861, s. 192, and the opinions expressed, especially by Lord Chancellor Westbury, on that section, I should have thought the clause reasonable.

POLLOCK, C.B. I agree with my Brothers Bramwell and Channell. There is nothing in the statute to justify the introduction of a clause providing that a debtor who fails to verify his debt within a certain time shall forfeit it, and it is in my opinion unreasonable. With regard to the deed referred to by my Brother Martin, I would point out that it bound none but actual parties to it, and that in such a deed a clause similar to the present one might well be held reasonable; but the same rule cannot be applied to a deed entered into under a statutory power, and which aims at producing the effect of a bankruptcy by an arrangement, made between the debtor and a portion of his creditors, but binding on the whole. On this ground I adhere to the opinion I expressed during the argument; but I must add that the case of

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Coles v. *Turner* (1) is an authority supporting the same view of the question. In delivering the judgment of the Court of Exchequer Chamber, Blackburn, J., says (2): "We base our decision on this, that we think the clause now in question has not the effect of depriving the creditor, who fails to produce proof to the satisfaction of the trustee, of all benefit under the deed, and that we think the clause, as we construe it, quite reasonable." In my judgment the conclusion follows, that if the deed had had the effect of depriving the creditor, who failed to produce proof to the satisfaction of the trustee, of all benefit under the deed, the Court of Exchequer Chamber would have held it to be unreasonable. The learned judge further says: "It will be found that the provision in this deed perhaps requires no more from the creditor than would be required if the deed were silent—at all events requires nothing unreasonably beyond what would be thus required. It does not make the trustee an arbitrator finally to decide whether there is any debt, or what is the amount of that debt; *nor does it impose any penalty* on the creditors who fail to produce what the trustee thinks sufficient proof of the debt." If the deed had imposed a penalty, if it had contained a clause of forfeiture, the Exchequer Chamber would, it should seem, have held the deed bad. I am therefore of opinion that this deed, which is to bind as well non-assenting as assenting creditors, is unreasonable on account of its containing this provision as to forfeiture.

Judgment for the plaintiff.

Attorney for plaintiff: *E. Doyle.*
Attorney for defendant: *J. J. Rae.*

(1) Law Rep. 1 C. P. 373. (2) At pp. 379, 380.

[IN THE EXCHEQUER CHAMBER.]

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June 18.

SMITH AND ANOTHER *v.* RIDGWAY.

Will—Construction—Appurtenances.

The testator was seised in fee of two manufactories at H., one on the east, and the other on the west side of the High Street. The latter was worth one half as much again as the former. They had for the last thirty years been occupied and used together at a single rent as an earthenware manufactory, and they were at the date of the devise and of the testator's death so used and occupied by R. and A. They had formerly, however, been used separately, and with some alterations were capable of being so used again. By his will, the testator devised all his real estate to trustees for sale, and, by a codicil, devised his "messuages, manufactory, &c., on the west side of High Street, in the occupation of R. and A. and others, . . . together with all rights, members, and appurtenances to them belonging or appertaining," to A. and W.:—

Held, that the manufactory on the east side did not pass under the devise to A. and W.

APPEAL from the judgment of the Court of Exchequer, discharging a rule to enter a nonsuit. (1)

The question arose upon the construction of the will and codicil of Joseph Mayer. By his will, dated 23rd April, 1860, he devised all his real estate to the plaintiffs upon trust for sale; by a codicil, dated 26th June, 1860, he devised as follows:—"I give and devise . . . . . my messuages, cottages, manufactory, and land, on the west side of High Street, in Hanley aforesaid, in the occupation of Ridgway and Abingdon and others, my messuage on the east side of High Street, in Hanley aforesaid, in the occupation of Mrs. Ridgway, my messuage on the east side of Hanley aforesaid, in the occupation of Mrs. Adams (2), and my five messuages or cottages at the corner of Broom Street, Hanley, aforesaid, in the occupation of William Chesters and others, all which said messuages, lands, hereditaments, and premises are situate in the parish of Stoke-upon-Trent aforesaid, together with the stables, warehouses, outbuildings, yards, gardens, and all other rights, members, and appurtenances to the said messuages or tenements, lands and hereditaments, belonging or appertaining,

(1) Reported ante, p. 46.

(2) It appeared that these as well as the following premises, were also on the *east side of High Street.*

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unto my friends, Leonard James Abington and Abner Wedgwood, of the parish of Stoke-upon-Trent, absolutely as tenants in common."

The testator also owned a manufactory on the *east* side of High Street, which was occupied and used with that on the west side; this was claimed by the devisees under the codicil as appurtenant to the latter, but the Court below were of opinion that it did not so pass to them.

From this decision the defendant appealed.

Terrell (*Quain* with him), for the defendant, in support of the more extended construction of the word "manufactory," cited *Steele* v. *Midland Railway Company* (1), and the comment there (2) by Turner, L.J., on the case of *Doe* v. *Collins* (3); and *Bodenham* v. *Pritchard*. (4)

Milward, Q.C. (*Baylis* with him), for the plaintiffs, cited *Webber* v. *Stanley* (5), as establishing the proposition, that where there is a subject matter to which the whole description exactly applies, no part of the description can be rejected.

The arguments on each side were in substance the same as those used in the court below. (6)

WILLES, J. We are all of opinion that the judgment must be affirmed. The question for our decision is, whether the words in the devise, "on the west side of High Street," ought to be rejected as a falsa demonstratio, or whether they are true words of restriction upon the general terms of the devise in which they are inserted. It is unnecessary to enter into an examination of the authorities, for they are consistent, from the time of Lord Bacon to the decision in the case of *Webber* v. *Stanley* (5), where Erle, C.J., laid down the law with a clearness and authority which cannot be strengthened or added to. The rule which they establish is, that where words can be applied so as to operate on a subject matter and limit the other terms employed in its description, or in other words, where there is a subject matter to which

(1) Law Rep. 1 Ch. Ap. 275.
(2) At p. 291.
(3) 2 T. R. 498.
(4) 1 B. & C. 350.
(5) 16 C. B. (N.S.) 698, 752; 33 L. J. (C.P.) 217.
(6) Ante, p. 49.

they all apply, it is not possible to reject any of those terms as a falsa demonstratio. This is expressed in Lord Bacon's maxim, "non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram." The question, therefore, is, whether, looking at all the words employed, they are satisfied by a complete description of the property on the west side of High Street, or whether, in order to satisfy the language taken altogether, it is reasonable to say that the property on the east side passes also, and that the words of limitation must be rejected. The result of the evidence is, that there was on the east side a factory of an old-fashioned kind, which was formerly used as a distinct manufactory; that, in the state in which it was in 1860, it could not be so used without work being done to set it to rights, but that with some alteration and repair it was capable of being again used as a distinct manufactory. Both factories were taken together under a lease in 1830, and have since been held together. It seems that the one on the east side was formerly of equal importance with the other, but that, in consequence of various improvements, the manufactory on the west side afterwards became the more important one, the principal processes were carried on there, and that on the east side was used more or less as subsidiary to it. Here then there was at the time of the devise, and of the testator's death, a manufactory on the west side, answering the description in his will, and another on the east side within some, but not within all, the terms of the description. The reason relied on to induce us to reject those words of the testator, which, though apt to describe the one, are inapplicable to the other, was, that in the will the term manufactory was used, not alone, but in composition with general language, sufficiently extensive to include all that was necessary for conducting the business of the manufacture as it was then carried on, and in a condition in which the use of the one building was essential to the use of the other. The general words "used therewith," which are often inserted to take in any small members of the property that may have been omitted in the previous specific description, are not found in this will; but it is insisted that the manufactory on the east side ought to pass as "belonging or appertaining" to the manufactory on the west side. No doubt words primâ facie describing only a building may be

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construed to include land so intimately connected with the use of the building that without it the building would be useless, as in the cases collected in *Steele* v. *Midland Railway Company* (1), and in the notes to *Smith* v. *Martin*. (2) It may be further admitted that "manufactory" is a larger and vaguer term than "house," and that it may include, not only the place where the machinery works, but outbuildings, as drying houses, or even land used in the course of the manufacture, as for instance bleaching grounds. But here the difficulty is, that what is sought to be included is not a mere accessory to the factory with which it is said to pass, but is at some distance from it, and is capable of being itself used as a manufactory. It may be observed further, that between the description of the manufactory, and the general words relied upon, there is inserted a devise of property also lying on the east side, and which is, like the manufactory, described by reference to its locality. Lastly, the defendant's contention is not assisted here by the argument which (whether valid or not) is often resorted to, that there is apparent on the face of the will, an intention on the part of the testator to dispose of the whole of his property; for the result of our holding that the manufactory on the west side alone passes, is not that the testator is intestate as to that on the east side, but that it goes under the will to the trustees on trust for sale. On the question, therefore, whether the words "on the west side of High Street" are a falsa demonstratio of what is otherwise sufficiently described, or a true restriction of the terms of the devise, we must hold that they are a true restriction; and the judgment of the Court below is therefore affirmed.

BYLES, BLACKBURN, MELLOR, and SHEE, JJ. concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory & Rowcliffes.*
Attorneys for defendant: *Raw & Gurney.*

(1) Law Rep. 1 Ch. Ap. 275. (2) 2 Wms. Saund. 401.

[IN THE EXCHEQUER CHAMBER.]

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June 18.

REDPATH *v.* WIGG AND ANOTHER.

Principal and Agent—Debtor and Creditor—Inspectorship Deed under the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192.

A trader, carrying on business as C. J. M. & Co., ordered goods of the plaintiff, and before their delivery executed an inspectorship deed, of which the defendants were inspectors. The plaintiff afterwards wrote a note, addressed to the debtor, informing him that the goods were ready for delivery, and the defendants replied, requesting him to send the goods, and signing "*for* C. J. M. & Co." The plaintiff sent the goods, and default being made in payment, sued the defendants for the price.

The inspectorship deed gave the debtor licence to carry on his business for six months under the control of the inspectors, who had power to put an end to the deed. The inspectors were to receive all the proceeds, pay current expenses (including salaries, rent, and plant and materials for the purposes of the business), and out of the surplus pay dividends to the creditors. They took no share of the profits, and had no power to take the management of the business to the exclusion of the debtor:—

Held, that the defendants having expressly signed the order "*for* C. J. M. & Co." they could only be liable as the real principals for the time being; that the deed did not constitute them the masters or real principals of the debtor in carrying on the business; and that, consequently on the above facts, there was no evidence to go to the jury of their liability. The plaintiff could only look for payment to the firm of "C. J. M. & Co.," and to the trust in the deed for the payment of current expenses.

ERROR on a bill of exceptions to the ruling of Martin, B., on the trial of this cause at the London sittings after Hilary Term, 1866.

This was an action for goods sold, brought against the inspectors of the estate of C. J. Mare, who had traded as a shipbuilder in the name of C. J. Mare & Co. The goods in question were, before the inspectorship deed, ordered of the plaintiff, an iron-founder trading under the name of Redpath & Leigh, by an order dated the 9th December, 1864, signed by a clerk of Mare's "*for* C. J. Mare & Co.," and inclosed in a letter dated the 12th December, and similarly signed. Before the goods were ready for delivery Mare stopped payment, and on the 3rd January, 1865, he executed an inspectorship deed under the Bankruptcy Act, 1861, under which the defendants were inspectors. On the 1st February, the plaintiff sent a letter, addressed to C. J. Mare & Co., giving notice

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that the goods were ready for delivery, and on the 6th February the plaintiff received from the defendants a note in these words:

"Northfleet Dockyard, 3rd February, 1865.—No. 291.

Messrs. Redpath & Leigh,

Please send three of Redpath's patent iron pumps, No. 4 size, two Fire Hearths (one for natives of India).

(Signed) George Wigg, J. Lyster O'Beirne,
For C. J. Mare & Co."

These were the same goods previously ordered, and they were, on the 13th February, delivered at Mare's place of business, with an invoice made out to "The Inspectorship Trustees of the estate of C. J. Mare & Co." On the 28th February, the invoice was sent back with a note, signed by a clerk "*for* C. J. Mare & Co.," requesting that it might be altered and made out to "C. J. Mare & Co." This alteration was accordingly made by a clerk of the plaintiff's, and the invoice so altered was returned, but this was done without the plaintiff's authority.

These facts having been proved at the trial, the counsel for the defendants objected that there was no evidence to go to the jury of the liability of the defendants, but the learned Baron ruled that there was evidence; and the jury having found a verdict for the plaintiff, the defendants tendered this bill of exceptions.

The deed was made between C. J. Mare, of the first part, George Wigg and William Green (for whom J. Lyster O'Beirne was afterwards, under a power in the deed, substituted by G. Wigg), as inspectors of the second part, and the creditors of C. J. Mare of the third part.

By it the creditors granted to the debtor absolute liberty and licence to conduct, manage, and carry on his business as a shipbuilder, and to collect and dispose of all his real and personal estate, under the inspection, and subject to the approbation, direction, and control of the inspectors, for six months from the 1st January, 1865.

The debtor covenanted to make out accounts of his assets and liabilities; to use his best endeavours to carry on the business, subject to the direction, control, and advice of the inspectors; to collect and realize his property for the benefit of the creditors; not during the inspectorship to dispose of any of his property, or give

any preference to any of his creditors; to keep proper books of account, and to allow the inspectors to examine the same; not to engage in any new trade, or doubtful or uncertain contract, or become security for any one, or do anything which might hinder the inspection or liquidation contemplated by the deed; and the debtor appointed the inspectors his attorneys to sue for and recover his estate and effects, to sign his name, and to act for him generally in matters connected with the deed.

It was further provided, that the inspectors might employ, or authorize the debtor to employ, any persons as clerks, workmen, &c., to assist in carrying on the business, and might pay to them, or to the debtor for his services, out of the moneys in hand, such reasonable salaries, wages, or remuneration as they should think fit; that all the moneys which might come to the hands or under the control of the inspectors should (after payment of the costs of obtaining them), be applied by or under the direction of the inspectors, in the first place, in payment of the costs and expenses of the previous investigation of the debtor's affairs, and the execution, &c., of the deed; and in the second place, in the payment of the costs of carrying out the powers and provisions of the deed (including the payment of such salaries, &c., as aforesaid); and in the third place, in payment rateably of the debts due from Mare to the said creditors; and that all costs and expenses to be incurred in and about the carrying on of the business, whether for salaries or wages, or for rent or other outgoings in respect of the business premises, or for the purchase of plant or materials for the purposes of the business, or otherwise in respect of the business, should, in the first instance, be paid out of the moneys to be produced by the carrying on of the business, and subject thereto, out of any moneys which might come to the hands or under the control of the inspectors. It was further provided, that whenever the inspectors had money in their hands to the amount of 50*l.*, they should pay the same into a bank to their own account, which account should be drawn upon as they should direct; that they should, whenever the moneys in their hands were in their opinion sufficient for that purpose (after allowing for current expenses), pay dividends to the creditors, retaining a sufficient sum to pay like dividends to non-assenting creditors, and on unascertained debts; the inspectors had power to

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litigate and compromise claims by and against the debtor; to require the verification of debts; to pay, out of moneys in hand, the expenses of carrying out contracts in the way of the business already entered into by the debtor, or which he might during the continuance of the inspectorship enter into with the sanction of the inspectors, and to determine any such contract upon such terms as they might think fit, if they should be of opinion it would be for the benefit of the estate.

The inspectors had power to put an end to the deed on violation of its terms by the debtor; if at the end of six months the creditors were not paid, the debtor was to wind up the business under the inspectors' control, unless the creditors should in the meantime extend the period for the inspection and letter of licence for a further period of not more than six months; and if the creditors should pass a resolution accepting a composition, the provisions of the deed were to cease. The deed further contained a power to appoint new inspectors, a proviso that the inspectors' receipts should discharge, and a declaration that the deed was intended to operate as a deed of inspectorship under the Bankruptcy Act, 1861.

May 14. *J. C. Mathew*, for the defendant O'Beirne (1), contended that the defendants could only be liable as the real principals of Mare, and that the facts furnished no evidence that they were so; and referred to *Hart* v. *Alexander* (2); *Cox* v. *Hickman* (3); and *Bullen* v. *Sharp*. (4)

J. Brown, Q.C. (*Barnard* with him), for the plaintiff. The letter of the 3rd February, amounted to a fresh order, and in writing it the defendants acted as principals. If they had acted merely as inspectors, they should have used words to shew it, for example, by signing the letter as "approved" by them. The course which they took induced the plaintiff to send the goods, evidently in the belief that he was giving credit to the inspectors, as the invoice shews; and since their expressions are ambiguous, the words should be taken in the sense most favourable for third persons dealing with them.

J. C. Mathew, in reply.

Cur. adv. vult.

(1) *Garth* appeared for the defendant Wigg, but only one counsel was allowed to be heard.

(2) 2 M. & W. 484.

(3) 8 H. L. C. 268.

4) Law Rep. 1 C. P. 86.

June 18. The judgment of the Court (Willes, Byles, Blackburn, Keating, Shee, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. This was an action for goods sold and delivered, brought by the plaintiff, who carried on business as an ironfounder under the firm of Redpath & Leigh, against the inspectors of C. J. Mare, who carried on business as a shipbuilder under the firm of C. J. Mare & Co. The deed of inspectorship was dated the 3rd of January, 1865, and was intended to operate under the Bankruptcy Act, 1861.

The goods were ordered by Mare, and his order was accepted by the plaintiff before the deed; the stoppage of payment took place before they were ready for delivery. On the 1st of February, 1865, the plaintiff wrote to C. J. Mare & Co., stating that the goods were ready, and awaited further instructions as to delivery. On the 3rd of February, 1865, an order for delivery was sent to the plaintiff, signed by the defendants, as follows:

"Northfleet Dockyard, 3rd February, 1865.—No. 291.

Messrs. Redpath & Leigh,

Please send three of Redpath's patent iron pumps, &c., (describing the goods previously ordered).

(Signed) George Wigg, J. Lyster O'Beirne,
For C. J. Mare & Co."

Upon this order being given, the goods were, on the 13th of February, 1865, sent in to Mare's place of business, together with an invoice, making the inspectors debtors. Whether this invoice came to their knowledge did not appear, and it was soon afterwards returned, with a request that C. J. Mare & Co. should be made the debtors instead of the inspectors. This required alteration was accordingly made by one of the plaintiff's clerks, and the invoice returned, but, as the plaintiff at the trial stated, without his knowledge; so that the invoice may be considered out of the case, and the question for our decision is, whether the order of the 3rd of February, and the supply of the goods thereunder, furnishes any evidence of liability on the part of the defendants.

Upon this it is first to be observed that there was no suggestion of fraud. The deed when put in appeared to be an ordinary

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transaction, the bona fides of which was not impeached. Nor was the action founded upon any misrepresentation as to authority from Mare to give the order in the name of C. J. Mare & Co. The order upon the face of it purported to be given by the defendants for a named principal, on whose behalf, and not for themselves, they professed to act. Had the order been signed, like the original one, by a clerk of C. J. Mare & Co., no liability could have been imposed upon such clerk except by shewing want of authority from the alleged principal. And the burden of proving such want of authority would have rested with the plaintiff. No such evidence was offered or suggested to exist in this case. The plaintiff, therefore, cannot rely upon any ostensible liability of the defendants, but must shew that the capacity which they actually filled was that of Mare's real principals, so as to be in substance themselves C. J. Mare & Co. for the time.

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This question, whether the inspectors are to be considered as principal traders, and the debtor only a servant or agent of theirs, is one of great and general importance, so far as we are aware, quite novel, and one the decision of which in the affirmative may seriously interfere with arrangements under inspectorship, inasmuch as it must needs deter responsible persons from undertaking the office. It would of course be possible to suppose a case in which the debtor became by the arrangement a mere servant, acting only for the benefit of others, or in which the business was intended to be carried on at the expense of new creditors who might be deceived into giving credit to the debtor, but really for the advantage of the old ones. Such a case, should it arise, will admit of an easy solution as one of fraud.

On the other hand, there may be a good business with a temporary embarrassment, where the intention is to keep together the debtor's business in his name (which may be an important element in its value), and for his permanent benefit as well as for the temporary benefit of his creditors; where with that view a letter of licence is granted, enabling him to carry on the business and to retain it for himself after he has paid his creditors, but the creditors stipulate that, until the debts are discharged, the business shall be carried on under the inspection and control of persons appointed by them, who shall receive the proceeds, pay

the current expenses of the business, and distribute the surplus; in such a case the object seems to be to maintain the debtor in the same position as he previously occupied, as the person principally interested in the business; and it seems no more reasonable to hold the inspectors liable, as being his masters, than it would be to say that a confidential clerk, to whose opinion his employer habitually deferred, or to whom he entrusts the entire conduct of the business, is as to third persons the principal.

The difference between such a case and the present is, that there the principal might resume the control at any time, whereas in the case before us, Mare could only do so upon payment of the debts, or a composition agreed to by a majority of the creditors, or by breaking his contract to submit to inspection, which he might do if he thought proper, at the risk of damages and loss of the benefit of the deed. But the cases put by way of illustration clearly shew that the mere fact of inspecting and controlling another person's business does not involve responsibility for debts contracted therein by him or in his name; and as for this contract, it cannot in favour of third parties create such responsibility unless it makes the inspectors the real principals.

In order to ascertain the precise position which the defendants occupied, it will therefore be proper to refer to the terms of this deed. [The learned judge then stated the effect of the deed as set out above, and continued:] It thus appears that the intention of the parties was, instead of pressing Mare for immediate payment or liquidation, to allow him to continue his business in such a manner, if possible, that after paying off his creditors he should have the option of going on for himself; that the business was to remain his, subject to his clearing off his debts; that the inspectors were to advise and control him, to receive the proceeds of the business, and after paying current expenses (including such debts as the plaintiff's), and not before, to divide the surplus amongst his old creditors. They were not to have any share of the profits, and were only to receive their actual costs and expenses. The deed contains no power to the inspectors to take the management of the business to the exclusion of Mare; so that they could not dismiss him, as a master or principal might his servant or agent.

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Under these circumstances, we think it cannot be maintained that these inspectors became Mare's masters or principals in the business, or liable as such for debts incurred by Mare & Co.

Nor can the plaintiff justly complain of this result. The form of the order gave him notice that Mare & Co. were his customers, and to that firm, and to the trust for payment of current expenses, he must be content to look.

The direction of the learned judge, that under the above circumstances there was evidence of liability on the part of the defendants, was therefore erroneous, and a trial de novo must be awarded.

Venire de novo.

Attorney for plaintiff: *C. E. Strong.*

Attorneys for defendants: *Young, Jones, Roberts, & Hall.*

June 19.

[IN THE EXCHEQUER CHAMBER.]

REUSS AND ANOTHER *v.* PICKSLEY AND ANOTHER.

Agreement—Statute of Frauds (29 *Car.* 2, *c.* 3) *section* 4*—Proposal in Writing —Parol acceptance.*

A proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds.

Warner v. *Willington*, 3 Drew. 523; *Smith* v. *Neale*, 2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143, confirmed.

APPEAL by the defendants against a judgment of the Court of Exchequer discharging a rule to enter a nonsuit or for a new trial on the ground of misdirection and that the damages were excessive.

Declaration: first count, that it was on the 8th September, 1864, agreed between the plaintiffs and the defendants that the defendants should retain and employ the plaintiffs as the agents of the defendants in Russia for ten years from that date, in and about the sale for the defendants in Russia of machinery by them manufactured in their business as engineers at Leigh, near Manchester; that the defendants should allow to the plaintiffs full discount for

cash on all orders received by the plaintiffs direct, and should hand over to the plaintiffs to be dealt with in the same way all orders the defendants should receive from Russia except those from Odessa, and that on all orders executed by the defendants from Russia except Odessa that might come through any other agents in Great Britain, the defendants should allow the plaintiffs a commission of 5*l.* per cent.; that the plaintiffs should confine themselves to the defendants for the sale of every description of machinery which the defendants manufacture and the plaintiffs should sell in Russia; that the plaintiffs should take charge of certain machines of the defendants in Hull intended for the Moscow exhibition and to be exhibited there by the defendants, and that the plaintiffs should pay all freight, &c., for the same until as many of such machines as possible were delivered in Moscow; that after the close of the exhibition as many as remained unsold should be at the risk of the defendants, and that the plaintiffs should pay cash for all machines sold during the exhibition, the price to be calculated [in a manner in the declaration specified]. And all things happened &c., yet the defendants would not allow the plaintiffs full discount for cash, nor hand over to the plaintiffs to be dealt with the several orders received from Russia except from Odessa, nor pay the commission agreed on on orders through agents in Great Britain. And although the plaintiffs were willing to continue such agency as aforesaid, the defendants wrongfully and before the expiration of ten years dismissed them, whereby the plaintiffs have been injured.

Second count, that it was agreed between the plaintiffs and the defendants as in the first count mentioned, that the plaintiffs thereupon became the defendants' agents, and during the continuance of the agency in the first count mentioned the defendants voluntarily put an end to their business by transferring it to a joint stock company, and thus precluded themselves from carrying on the said business and thereby put an end to the said agency, although the plaintiffs were ready and willing to continue the same, whereby &c.

The defendants, amongst other pleas, as to the first count denied the agreement therein alleged, and as to the second count denied that the plaintiffs became their agents as therein alleged.

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The cause was tried at the Manchester winter assizes before Pigott, B., when the following facts were proved:—At the time of the alleged agreement the plaintiffs carried on business at Manchester, and the defendants carried on business as agricultural implement makers, at Leigh near Manchester, under the style of Picksley, Sims, and Co. In the autumn of 1864 an industrial exhibition was fixed to be held at Moscow, and the defendants were desirous of exhibiting some of their machines there. Accordingly they entered into negotiations with the plaintiffs, with the view of the plaintiffs undertaking to look after the goods sent by the defendants whilst at the exhibition. The plaintiffs at first declined the responsibility, but upon the defendants proposing to make an agency for ten years with them if they would bear a part of the expense of the exhibition, one of the plaintiffs, Mr. Ernst Reuss, stated that he would go to Moscow and himself superintend the arrangements necessary for exhibiting the defendants' goods. With that intention he went to Moscow in July, 1864, and remained there for a month. Meantime a quantity of goods were sent by the defendants to the plaintiffs for the purpose of being forwarded to the exhibition. On Mr. Reuss's return he requested an interview with Mr. Sims, one of the defendants, with reference to the Russian agency. An interview thereupon was had at which the terms of the agency were discussed, and afterwards the plaintiffs wrote to the defendants the following letter:—

"Manchester, 8th September, 1864.

Messrs. Picksley, Sims, & Co., Leigh.

Referring to our conversation with Mr. Sims, respecting the machinery for the Moscow exhibition, it was arranged that we take charge of all the machines &c., in Hull, and pay for your account all freight charges, insurances &c., till delivered in Moscow. That we sell in Moscow as many of the machines as possible, and that after the close of the exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or return home as you think fit at your expense. That we pay you here cash for all machines sold during the exhibition, the price to be calculated at list price less the full trade discount for cash, that you pay the travelling expenses there and back of Mr. Smith, but that we pay his additional salary whilst in Moscow of 10*s.* per day, and his

hotel bill. That the agency for Russia be for ten years from date on following conditions. You to allow us full discount for cash on all orders received by us direct, and that you hand over to us to be dealt with in the same way all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia, excepting Odessa, that may come through any other agent in Great Britain, you allow us a commission of 5*l.* per cent. That we act as and are hereby appointed your sole agents for the kingdom of Italy on the same conditions as for Russia. Awaiting your reply we are &c.,

Ernst Reuss & Co."

To that letter the defendants replied as follows:

"Bedford Foundry, Leigh, Lancashire,
September 9th, 1864.

Our Mr. Sims desires me to acknowledge the receipt of your favour dated the 8th inst., and to say as far as the agency for Russia goes he considers it satisfactory, except that you must confine yourselves to us for every description of machinery we manufacture, and which you sell in Russia. With respect to Italy, Mr. Sims, cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly.—I am, &c.

p.p. Picksley, Sims, & Co., Joseph Smith.

Messrs. Ernst Reuss & Co."

The plaintiffs sent no reply to this letter, but after the date of it goods were sent to them by the defendants, and were forwarded by the plaintiffs to Moscow, where they were shown at the exhibition, which took place on the 7th September, 1864. At the close of the exhibition a great proportion of the goods remained unsold, and in respect of these, as well as in respect of those sold, the plaintiffs incurred considerable expenses.

On the 8th December, 1864, the defendants transferred their business to a Joint Stock Company, and in the February following, the plaintiffs' Moscow agent died. Shortly afterwards the plaintiffs and defendants entered into a correspondence with a view to a settlement of the matters connected with the Moscow exhibition, but the parties were unable to come to any agreement. The plaintiffs thereupon brought this action. No orders for machinery from

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England had been received by either plaintiffs or defendants for Russia (except Odessa), at the time of the alleged breach.

Upon the trial the learned judge directed the jury that the Moscow and Russian stipulations in the letters of the 8th and 9th September were parts of one and the same contract, and the jury found that the plaintiffs did accept and accede to the terms of that contract. A verdict was accordingly entered under the direction of the learned judge for the plaintiffs, damages 850*l.* Leave was reserved to the defendants to move to set aside the verdict and enter a nonsuit on the ground that there was no sufficient memorandum in writing of the contract under the Statute of Frauds (29 Car. 2, c. 3), s. 4, which enacts, amongst other things, that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or his agent. A rule nisi was obtained in Hilary Term last pursuant to leave reserved, and also for a new trial, on the ground of misdirection by the judge in ruling that the Moscow and Russian stipulations were one contract, and of the damages being excessive. The Court (Feb. 8) discharged this rule (the plaintiffs consenting to reduce the damages to 650*l.*), holding themselves bound by the authority of *Smith v. Neale.* (1) Pollock, C.B., however, stated that had the question been res integra he should have been disposed to come to a contrary conclusion. Against this decision the defendants appealed, and the question for the opinion of the Court was, whether the defendants were entitled to have the verdict found for the plaintiffs set aside, and a nonsuit entered.

Brett, Q.C. (*Hayman* with him), for the defendants. There is no evidence of an assent by the plaintiffs sufficient to bind the defendants to the terms of the contract or contracts contained in the letters of the 8th and 9th September. In *Warner* v. *Willington* (2), Kindersley, V.C., says that for "an act to constitute a sufficient acceptance of a written proposal, it must be an unambiguous act; and an acceptance of a written proposal

(1) 2 C. B. (N. S.) 67; 26 L. J. (C.P.) 143. (2) 3 Drew, at p. 533.

must be an unconditional acceptance." Now, the present case may be regarded in two ways; either the letter of the 9th may be regarded as an assent, with certain modifications, to the terms contained in the letter of the 8th, so as to constitute an entire contract, or else the two letters may be taken to constitute a proposal to which the plaintiffs assented by conduct without writing. As to the first alternative, the letter of the 9th was not an assent but a counter-proposal. The letter of the 8th in reality contained the terms of three separate contracts, as to the Russian agency, as to the Moscow exhibition, and as to the Italian agency. Then the reply is silent as to the Moscow exhibition, modifies the terms suggested as to the Russian agency, and declines the Italian agency altogether. The acceptance, therefore, as far as this reply goes, was neither unequivocal nor unconditional. As to the second alternative, if the contracts ought to be considered as three and not one, the plaintiffs' conduct does not amount to an assent as far as the Russian agency is concerned. But granting that the two letters do contain a memorandum of a proposal signed by the party sought to be charged, that cannot be accepted by parol. *Warner* v. *Willington* (1), is an authority to the contrary, but with that exception there has been no case on the subject. Kindersley, V.C. (p. 532), says, "I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient."

[BLACKBURN, J., referred to *Colegrave* v. *Upcot* (2), cited in Sugden Vendors and Purchasers, 10th ed. vol. i. p. 164, as decisive of the point.]

The Vice-Chancellor could not have considered that case in point for it was cited in the argument before him. *Smith* v. *Neale* (3), on which the Court below acted, merely follows *Warner* v. *Willington.* (1) It is moreover not an express decision on this question though Willes, J., expresses an opinion in conformity with that of Kindersley, V.C. The *Liverpool Borough Bank* v. *Eccles* (4), also followed the same case.

[WILLES, J., referred to *Mozley* v. *Tinkler* (5), where Parke, B.,

(1) 3 Drew, 523. 2 Jur. N.S. 433. (2) 5 Vin. Abr. 527.
(3) 2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143. (4) 4 H. & N. 139.
(5) 1 C. M. & R. 692.

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indicates that a proposal in writing need not be accepted by writing.]

The principle of the sufficiency of a parol acceptance ought to be confined to a case where the writing assented to is in itself a memorandum *of an agreement* and not a mere offer. If it is the latter a subsequent acceptance without writing cannot be enough: it cannot turn a *proposal* into an agreement or memorandum sufficient to satisfy the Statute of Frauds. Kindersley, V.C. in the case already referred to recognises but does not act upon the distinction between a memorandum of agreement and of offer. "The one," he says (1), "supposes that the two parties have verbally made an actual contract with each other, and when the terms of such contract are reduced to writing and signed that is sufficient to bind the party signing, but if the memorandum is of an offer only, that assumes there has been no actual contract between the parties." This distinction is also recognised in the decisions on the Stamp Acts. A proposal accepted by parol requires no stamp, *i.e.*, it is not considered a memorandum of agreement.

Manisty, Q.C. (*Holker* and *Baylis* with him), for the plaintiffs. That the contract contained in the letters was one and not threefold is sufficiently shewn from the negotiations which preceded it. As to the letters themselves they constitute an entire proposal, and the defendants must be taken to have approved of and adopted the terms from which they do not dissent. Then assuming the contract to be one, the authorities and dicta, from *Colegrave* v. *Upcot* (2) downwards, are all in favour of the proposition, that a written proposal signed by one party may be assented to without writing by the other.

Brett, Q.C., in reply.

The judgment of the Court (Willes, Byles, Blackburn, Mellor, Shee, and Montague Smith, JJ.) was delivered by

WILLES, J., who after referring to the pleadings, proceeded as follows:—We are all of opinion that the judgment of the Court of Exchequer should be affirmed. It appears that the plaintiffs, through a member of their firm, had some negotiations with the

(1) 3 Drew. at p. 531. (2) 5 Vin. Abr. 527.

defendants, through a member of their firm, with reference to so much of the contract declared upon as related to the Moscow exhibition. In the course of these negotiations, the plaintiffs refused to encounter the expenses of this exhibition unless the defendants would undertake in some way or other to reimburse them, and accordingly communications as to the manner in which this object could be effected were entered into between the parties. It was suggested by the plaintiffs that they should be employed for a term of ten years as agents in Russia for the sale of machinery. But when first broached, that negotiation did not come to a head. One of the plaintiffs went abroad, and on his return sent word that he wished to see one of the defendants, Mr. Sims, on business, that business being with reference to the agency in Russia. An interview was thereupon had, at which the terms of the agency were discussed, and letters afterwards passed relating to the Moscow exhibition, the agency in Russia, and an agency which the plaintiffs desired in Italy. On the 8th September, 1864, one letter was written by the plaintiffs, and on the 9th an answer was sent by the defendants. The letter of the plaintiffs was to this effect. [The learned judge read so much of the letter as refers to the Moscow exhibition.] Then the letter proceeds to speak of the Russian agency in terms not applicable to a distinct or separate contract. Having dealt with the matters connected with the Moscow exhibition, which was to operate as accessory to the general agency, and as an advertisement, the letter goes on to detail the terms of the agency for Russia; and as to this part of the arrangement the plaintiffs do not state that they are to abstain from taking orders from other persons. To this, and to this alone, the defendants objected in the letter of the 9th. Then follows, in the letter of the 8th, the paragraph respecting the Italian agency.

In answer to this letter comes the letter of the 9th September. [The learned judge read the letter.] So far, therefore, as the Russian agency goes, the letter of the 8th was otherwise satisfactory to the defendants. Now, the letter of the 8th dealt with the Russian agency and also with the arrangement respecting the Moscow exhibition. There was no reference to the one as distinct from the other, and the conclusion is, that as to the Moscow exhibition no observation

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was required, and as to the Russian agency the sole objection was that the plaintiffs, instead of having the agency given to them without limitation, were to be prevented from being agents for any one else. As to the Italian agency, that is put out of the question. The meaning, therefore, of the whole is this:—"True we made a certain arrangement yesterday as to Russia, but we meant it to be with a limitation, and as to Italy we made no arrangement at all."

Now, this was either a memorandum of agreement, or at least a proposal with the terms of the letter of the 8th as a basis; a proposal, that is, that the plaintiffs should act as agents at Moscow, and become agents for Russia, pledging themselves to take no other agency. Therefore, I say these letters constitute either an agreement or at least a proposal. Assume it in favour of the defendants to be the latter.

We must now consider what followed. The Moscow exhibition took place, and the goods intended for exhibition were forwarded and dealt with by the plaintiffs as they undertook to deal with them. Expenses were incurred by the plaintiffs which they certainly would not have incurred without a promise of the Russian agency; and these expenses were incurred with reference to the Moscow exhibition. Was this evidence of assent on the part of the plaintiffs to the terms of the letter of the 9th September? The defendants maintain that it was not, and their argument depends on a dissection of the terms of the letter of the 8th. But we see no reason for dissevering those terms. The whole appears to have been one arrangement. When taking the two letters together we find the second silent as to the Moscow exhibition, and when we find moreover that the exhibition was accessory to and connected by way of advertisement with the rest of the Russian agency, we conclude that the whole transaction between the parties was one and indivisible. Therefore there was a performance of their part by the plaintiffs, which was evidence of an assent to the terms of the letters of the 8th and 9th September, or treating the letter of the 9th as a modified proposal, there was evidence that the plaintiffs assented to it.

Now in point of law what was the effect of this assent? Putting for the moment the Statute of Frauds out of the question,

no inquiry would be made as to the precise time at which the different parts of one single transaction took place. The question would be, was it or was it not one transaction, and was an assent contained in it; and in this case we are of opinion that the transaction was one, and did contain an assent. But the Statute of Frauds introduces a new element, because it makes it necessary by section 4 that an agreement not to be performed by either party within a year must be in writing, signed by the party to be charged therewith. Now all that was signed here was not a formal agreement but a proposal on one side, and there was an assent to that proposal on the other. All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to, does become a memorandum or note of an agreement within the 4th section of the statute.

Many cases might be put in illustration of this proposition, but one or two will be sufficient. Take for example a case arising under the Joint Stock Companies Act (19 & 20 Vict. c. 47), whereby it is provided that no person shall be deemed to have accepted any share in the company unless he testifies his acceptance by writing under his hand [Schedule Table B]. It was at first supposed that something must be done by the shareholder in writing after allotment, and that otherwise he would not be a shareholder because he proposed in writing to become one and to accept his shares upon allotment. But the Court of Common Pleas, when the case was brought before them, said that it was a mistake to suppose that under these circumstances there was no acceptance in writing. The true mode, they said, of regarding such a transaction was that it was from beginning to end one transaction, and accordingly they held that the acceptance was complete, and the statute satisfied by a proposal in writing to accept the shares, followed by an allotment. The Court there acted on a judgment

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delivered in the Court of Queen's Bench by my Brother Blackburn to the effect that the "acceptance" of goods to satisfy the Statute of Frauds, s. 17, may be prior to the actual delivery of them. (1) It is indeed quite a fallacy to suppose that because certain acts happen at different periods they cannot be so connected as to form one transaction. That was the ground of the Lord Keeper's decision in *Coleman* v. *Upcot* (2); where he held that an offer to sell an estate, made in writing and afterwards accepted by parol, bound as a contract. The principle of that case was recognised and assented to by Kindersley, V.C. in *Warner* v. *Willington* (3); he did not, however, treat it as precisely in point, probably on account of the note in Viner, stating that, in fact, there was an acceptance in writing. The judgment, however, was founded on the consideration that the parol acceptance was sufficient, and it is cited to support that position by Lord St. Leonards (Sugden, Vendors and Purchasers, 10th ed. vol. i. p. 164). The case of *Warner* v. *Willington* (3) was followed by the Court of Common Pleas in *Smith* v. *Neale* (4), and by the Court of Exchequer in *Liverpool Borough Bank* v. *Eccles.* (5)

So far as to agreements which must be mutual, but where the statute only requires the signature of the party to be charged. But we may usefully consider two classes of contracts. One class includes cases where a proposal is made which may or may not be acted on. The most ordinary example is a guarantee, which by section 4 of the statute must be in writing. The creditor may supply goods to the person whose credit is guaranteed or not as he pleases; but if he does supply them the surety is bound, except in cases like *Mozley* v. *Tinkler* (6) where on the true construction of the guarantee, which was in the form of a letter to the plaintiffs, it was held that notice of the plaintiffs' acceptance of it should have been given. But in that case it does not seem to have occurred to any of the Court that the acceptance need be in writing. Indeed the judg-

(1) The cases referred to are *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L. J. (Q.B.), 261; and *The Bog Lead Mining Company* v. *Montague*, 10 C. B. (N.S.) 481; 30 L. J. (C.P.) 380.

(2) 5 Vin. Abr. 527.

(3) 3 Drew. 523. 2 Jur N.S. 433

(4) 2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143.

(5) 4 H. & N. 139.

(6) 1 C. M. & R. 692.

ment of Lord Wensleydale (Parke, B.) rather points to the opposite conclusion. That case therefore is confirmatory of our decision that the whole evidence of an agreement need not be in writing, but only all the terms along with the signature of the party to be charged.

It has been urged upon us that this conclusion will lead to fraud and perjury, and to the very mischiefs the statute was passed to prevent. We do not concur in that view, because no one will be able to enforce an agreement of the sort we are now discussing, without proving that he did or was ready to do his part to entitle him to performance on the part of the other contracting party. Moreover, if good for anything, that argument is good to shew that a regular *agreement* or memorandum of it, signed by one party only, ought not to bind him. The reason we have given is a good answer to the argument, but that argument was also considered by the Court of Common Pleas in *Laythoarp* v. *Bryant* (1), where the Court held, in spite of a weighty dictum of Sir W. Grant in *Martin* v. *Mitchell* (2), that only the party to be charged need sign, the other party, however, at the same time being ready to fulfil his own part of the agreement before suing.

Again, take another case, viz., the case of a contract where both parties must sign, of which the most familiar example is an ordinary lease for years not under seal which, by the conjoint operation of sections 1 and 4 of the statute, must be in writing, signed by the parties making the same. I am referring for the moment to leases before the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, which enacted that leases required to be in writing by the Statute of Frauds shall thenceforth be under seal. Where such a lease was signed by the lessee only, he took no interest, and was not bound according to the principle laid down in *Soprani* v. *Skurro.* (3) Now, suppose the lessee were to sign before the lessor. Every argument which has been urged to shew that a subsequent act cannot turn what is not an agreement into an agreement would apply; but could any one seriously contend that it would make any difference whether the lessor or lessee signed a lease first? The law is clear upon the point. We are not to look at

(1) 2 Bing. N. C. 735. (2) 2 Jac. & Walk. at p. 428. (3) Yelv. 18.

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the precise moment at which an assent is given, but at the entire transaction, and if the assent when given does make a contract, that is enough; for the proposal, though prior in time, is in fact a memorandum or note of the terms of that contract, signed by the party to be charged within the meaning of the statute.

The judgment of the Court below must therefore be affirmed. We all approve of the reasoning of Kindersley, V.C., in *Warner* v. *Willington* (1), who, after all, only restated an old proposition of law.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory & Rowcliffes.*
Attorneys for defendants: *Underhill & Field.*

June 12.

BICKFORD *v.* DARCY AND BEACHEY.

Practice—Interrogatories—Tendency to Criminate—Bona fides.

In an action against D. and B., as attorneys and solicitors, for not investing in a proper manner certain moneys entrusted to them by the plaintiff, the plaintiff proposed to administer interrogatories to B., with a view of shewing that there was a partnership between him and the other defendant in the business of attorneys and solicitors. B. objected to the interrogatories on the ground that he had never been admitted as an attorney or solicitor, and that they might therefore tend to criminate him and expose him to an indictment under 6 & 7 Vict. c. 73, s. 2, for the misdemeanour of practising without a certificate.

The interrogatories were allowed, the Court considering that they were bonâ fide put to aid the action.

Baker v. *Lane* (2) modified and explained.

DECLARATION. First count, that in consideration that the plaintiff employed the defendants as attorneys and solicitors to invest certain moneys for her on mortgage, the defendants promised to invest the same in a proper manner; that they received the moneys for that purpose, but did not invest the same. Second count, for money payable for money received, &c.

The defendants, as to the first count, pleaded non assumpsit, and a traverse of the receipt of the moneys in pursuance of the alleged employment; and as to the second count, never indebted.

(1) 3 Drew. 523. (2) 3 H. & C. 544; 34 L. J. (Ex.) 57.

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The plaintiff applied to Pigott, B., at chambers, for leave to administer various interrogatories to the defendant Beachey, all of which had, on the face of them, the object of shewing that there was a partnership between the defendants in their business as attorneys and solicitors. The defendant Beachey objected to answer them, on the ground that he had never been admitted as an attorney or solicitor, and that the interrogatories therefore tended to criminate him by making him liable to an indictment under 6 & 7 Vict. c. 73, s. 2, for the misdemeanour of practising as an attorney or solicitor without a certificate. The learned judge, however, allowed them to be put. The first of them was as follows:—"Did you during the year 1857 and during the succeeding years down to July, 1865, or during any and which of such years, receive any and what share of the profits made in those years respectively in the business of attorneys and solicitors carried on by the firm of Darcy and Beachey at Newton Abbott, Devonshire?" The other interrogatories were similar in character, and inquired particularly as to the mode in which the profits were divided.

Karslake, Q.C., having obtained a rule nisi calling on the plaintiff to shew cause why the order made by the learned judge at chambers should not be rescinded,

Coleridge, Q.C., and *H. T. Cole*, shewed cause, and contended that the objection was one which should be postponed until the questions were put to the defendant Beachey. He might, perhaps, be privileged from answering, but he had no right to object to the questions being put to him: *Bartlett* v. *Lewis* (1); *Osborn* v. *London Dock Company* (2); *Stern* v. *Sevastopulo* (3); *Simpson* v *Carter*. (4)

[CHANNELL, B., referred to *Reg.* v. *Garbett*. (5)]

Karslake, Q.C., and *A. Wills*, in support of the rule, relied on *Baker* v. *Lane* (6), as shewing that questions tending to criminate ought not to be allowed.

(1) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.
(2) 10 Ex. 698.
(3) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268.
(4) 6 H. & N. 751 n.; 30 L. J. (Ex.) 224 n.
(5) 2 C. & K. 474.
(6) 3 H. & C. 544; 34 L. J. (Ex.) 57.

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[POLLOCK, C.B., pointed out that the gist of the present action was the non-investment of moneys, a branch of the business not necessarily of an attorney, but of a scrivener. It was therefore possible for the defendant to answer the interrogatories without criminating himself.]

The declaration charges the defendants with default "as attorneys and solicitors," and the interrogatories inquire into the circumstances of their partnership as such.

[POLLOCK, C.B. The words "as attorneys and solicitors" in the declaration are immaterial.]

At all events, these interrogatories *tended* to criminate.

POLLOCK, C.B. I am of opinion that this rule should be discharged. The case of *Baker* v. *Lane* (1) has been cited, where this Court disallowed certain interrogatories, and it is urged that, as to some of them at any rate, the ground of our decision was that they tended to criminate. But the true reason for our judgment in that case was, that we did not think the questions were bonâ fide. Now here I think that they are bonâ fide, and on that ground ought to be allowed.

MARTIN, B. I am of the same opinion. Mr. Coleridge has laid down the correct rule in these cases, and in Wigram on Discovery, 2nd ed. p. 80, it is stated in similar terms. The author says: "If a question involves a criminal charge, the plaintiff is not entitled to an answer to such a question." His expression is, "not entitled to an *answer*." In 1854, a power to enforce discovery was given to the Common Law Courts, and soon afterwards the case of *Osborn* v. *London Dock Company* (2), was heard in this court, when Alderson and Parke, BB., adopted the same rule, and the Court of Common Pleas have adopted it also. I may add that I consider that the question of whether or not interrogatories should be allowed, is a

(1) 3 H. & C. 544; 34 L. J. (Ex.) 57. 3 H. & C. at p. 553. "POLLOCK, C.B. In the case of *Baker* v. *Lane*, argued last term, where the question was, whether certain interrogatories which the plaintiff sought to administer ought to be allowed, the objection being made that some of them tended to shew that the defendant had committed a criminal offence, we are of opinion that the interrogatories ought not to be allowed." It will be observed that although the principal objection taken to the interrogatories at the bar is restated, no reason for the decision of the Court is given.

(2) 10 Ex. 698.

different matter from one of discovery in equity, and I think that all questions which are put malâ fide ought to be struck out. In *Baker* v. *Lane* (1), I thought they were so put, and that they had an ulterior object beyond that of helping the suit. Now here the question at issue is, whether the defendant Beachey is jointly liable with Darcy; and I think none but bonâ fide questions are put to find out whether the two defendants were partners, not, be it observed, in the general business of attorney, but as scriveners. This rule should therefore be discharged.

CHANNELL, B. I am of the same opinion. If I thought these questions had an indirect object, besides that of assisting the action, my conclusion would be different. But their object seems to be simply to shew, first, that a particular firm was intrusted with the duty of investing the plaintiff's money, and secondly, that the defendant was a member of that firm. The business of investing money, moreover, is not necessarily incident to the profession of an attorney. Again, the authorities, as far as they go are in the plaintiff's favour. The case of *Osborn* v. *London Dock Company* (2), is in his favour; and so also is the case of *Bartlett* v. *Lewis* (3), and I do not think that *Baker* v. *Lane* (1), overrules the fair inference to be drawn from these cases.

Rule discharged.

Attorney for plaintiff: *T. Martin.*
Attorneys for defendant: *Church & Sons.*

(1) 3 H. & C. 544; 34 L. J. (Ex.) 57. (2) 10 Ex. 698.
(3) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.

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June 8.

WRIGHT *v.* CHILD.

Sheriff—Special bailiff—Execution—Writ of fi. fa.

A debtor, whose goods had been seized under a writ of fi. fa., persuaded the officer executing the writ not to advertise the sale, and himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour, and on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him, and under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods, and they consequently sold at an undervalue:—

Held, that the above facts did not constitute the officer the agent of the execution debtor, so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale.

This was an action brought by the plaintiff, as assignee in bankruptcy of the estate of Joseph Outram, against the defendant, the sheriff of Staffordshire, for improper conduct by his officer in the execution of a writ of fi. fa. against the goods of the bankrupt, before bankruptcy.

Declaration. First count, that, before the bankruptcy of one Outram, a writ of fi. fa. was issued out of the Common Pleas against the goods of Outram, directed to the defendant, who was then the sheriff of Staffordshire, and indorsed for 163*l.*, with interest and costs (the 163*l.* being the amount recovered in an action brought against Outram by the Bank of England); that the writ so indorsed was delivered to the defendant as such sheriff, and that the defendant, before the bankruptcy, seized under the writ goods of Outram of a value more than sufficient to satisfy the writ, yet that, although the execution was upon a judgment recovered in an action for a debt over 50*l.*, the defendant wrongfully sold by auction the goods so seized, without advertisement on or during three days next preceding the day of sale, and wrongfully sold the goods for a price which was inadequate, and less than their reasonable price, and without taking due and reasonable care in advertising and giving notice of the sale, and without giving due and sufficient notice thereof; and also conducted himself negligently in the conduct and management of the sale, and wrongfully converted to his own use a great part of the goods, and of the

proceeds of the sale; and that by reason of the premises the sale realized much less than it otherwise would have done, and the plaintiff, as assignee, was deprived of a great part of the bankrupt's estate and effects.

Second, third, and fourth counts: similar to the first, except that they related respectively to writs for 189*l.*, 43*l.*, and 16*l.*, issued in other actions against the debtor, and except that the two last, which related to writs issued in actions for debts under 50*l.*, omitted the charge of negligence in selling within three days.

Fifth count, after stating that the writs mentioned in the preceding counts, so directed and indorsed, were delivered to the defendant as such sheriff, for the purposes in those counts mentioned, alleged in similar terms a seizure under them before the bankruptcy, and charged the same breaches of duty.

There were also counts in trover, on which nothing turned, and money counts, under which the plaintiff claimed to recover the amount of an overcharge by the officer in respect of fees.

Pleas. 1. To the first seven counts, not guilty; 2. To the first five counts, leave and licence by Outram; 5. To the money counts, never indebted.

Issue on all the pleas.

The case was tried before Montague Smith, J., at the Stafford spring assizes, and the following facts were proved: On the 20th July, 1865, the writs mentioned in the first, third, and fourth counts, all bearing date the day previous, were delivered to the undersheriff for execution. On the same day the officer made a levy on Outram's goods and, having made an inventory, gave instructions, on the 21st, to a printer to print and circulate bills for a sale at one o'clock on the 26th. The officer gave evidence that the debtor requested him not to issue the bills, and actively interfered to prevent their circulation, and that in consequence of this a few only were distributed; that the debtor also requested him several times to postpone the sale, but that he declined to do so, and that all attempts on the part of the debtor to raise money having failed, he proceeded on the morning of the 26th to sell. Between nine and ten o'clock on that morning he commenced to mark the lots for sale, but at the request of

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Mr. Prince, the debtor's attorney, postponed the hour of sale to give him time to raise the amount required. The attorney then left, but afterwards returned, and told the officer he must proceed with the sale. The latter, who had that day received the writ mentioned in the second count of the declaration, then informed the attorney of this fact, and said that, no notice having been given, he could not sell under that writ without the debtor's authority, and Prince, acting on the debtor's behalf, gave him authority to sell for all the writs. He then sent the bell-man round with the bills, and at about two o'clock the sale commenced. The amount realized was 436*l.*, which was not sufficient to satisfy all the executions, as well as 41*l.* demanded for rent, and the sheriff's fees and charges. Evidence was given for the plaintiff that the goods were not properly lotted, that the officer hurried the sale, and otherwise acted negligently and improperly in it, and that the sum for which the goods were sold was greatly below their value.

On the 1st of August, Outram was adjudicated bankrupt on his own petition, and the plaintiff, the official assignee, received the proceeds of the sale, under 24 & 25 Vict. c. 134, s. 73, deducting the sheriff's charges, and afterwards commenced this action.

The jury found that the issue of the bills was prevented by the bankrupt, but that proper care was not used in lotting the goods, and gave a verdict for the plaintiff for 150*l.* on the counts for negligence, and 15*l.* on the money counts, leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, or to reduce the damages, on the ground that the bankrupt had appointed the officer as his special bailiff, or had, by his acts, disentitled himself from suing the sheriff.

Griffits having obtained a rule accordingly,

Huddleston, Q.C., and *H. James*, shewed cause. There is no authority for the appointment of a special bailiff by the execution debtor, as to whom the whole proceeding is in invitum; and the cases relating to execution creditors, who have appointed special bailiffs, have no application. As to the debtor, the sheriff has a certain duty to perform, which cannot be varied by any dealing

with the officer, and his duty is to use proper care to realize the best price for the goods sold. But supposing it to be competent to the officer, by a contract with the execution debtor, to exonerate the sheriff from this duty, and to divest himself of the character of sheriff's officer, there is no evidence in this case of any such contract being made. This is nothing but the usual case of a debtor asking for indulgence. All the part that the debtor took in the matter was to prevent the issuing of the bills; and if there was any contract, it only reached to the extent of exempting the sheriff from liability for not advertising the sale. But the negligence for which the jury have given damages was negligence of the officer in the performance of his subsequent duty, and was not in any way dependent on or induced by the debtor's acts. To hold that the debtor by such interference made the officer his own agent, and no longer the agent of the sheriff, would be to go even beyond what has been held as to special bailiffs; for the appointment of a special bailiff does not wholly relieve the sheriff from his duty in respect of the writ which is put in execution: *Taylor* v. *Richardson*. (1) The case of *Cook* v. *Palmer* (2) may appear an authority for the defendant, but the judgment of Bayley, J., (3) shews that it is not so, for there goods, beyond the amount of the executions, having been sold at the request of the plaintiffs, a bankrupt's assignees, the learned judge says: "Upon that sale the officer was identified with the sheriff to the extent of the sum to be levied, but no further, his authority to sell to a greater extent not being derived from the sheriff, but from the plaintiffs and Theobald (the bankrupt), who merely made him their agent as to that part of the transaction. The sheriff never had any right to call upon the officer to pay over the surplus to him, nor was it the officer's duty to do so." But here the whole sale was under the writs, the officer was bound to pay over the whole to the sheriff, and the sheriff was bound to answer for the whole to the various execution creditors. But even if the bankrupt was estopped from suing, the assignee would not be bound by his acts. The rule can at the most only be made absolute to reduce the damages, for as to the 15*l.* for overcharges, the plaintiff is clearly entitled to retain his verdict.

Mellish, Q.C., and *Griffits*, in support of the rule. If the execu-

(1) 8 T. R. 505. (2) 6 B. & C. 739. (3) At p. 742.

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tion creditor appoints a special bailiff, he relieves the sheriff from all liability for the manner in which the bailiff discharges his duty; for, although for all other purposes the bailiff remains the officer of the sheriff, yet, so far as concerns the creditor, he is no longer the agent of the sheriff, but of the creditor, and the sheriff is not answerable for his acts to the creditor, although he may still continue responsible to the debtor. Conversely, the debtor may, by adopting the officer as his agent, release the sheriff as towards himself, though not as towards his creditors; and if after this the officer is guilty of any negligence, the debtor's remedy is by an action against him personally on his contract. In the cases relating to special bailiffs, it has been held that an act of personal direction to the officer is sufficient to make him the agent of the creditor, and to discharge the sheriff from liability: *Ford* v. *Leche* (1), *Porter* v. *Viner* (2) and *Pallister* v. *Pallister*. (3) This is reasonable, because it is impossible to say how far the conduct of the officer may be influenced by the deflexion from his usual course of duty, which has been caused by the interference of a third party, and the reason is as applicable to the case of the debtor's as to that of a creditor's interference. In the present case, the interference by the debtor far exceeds that which in many cases has been held to make the officer a creditor's special bailiff, and it continued to the moment of the sale. The sale itself was postponed to a later hour at his request, and when it took place, it included goods that, but for his direction and waiver of the preliminary notices, could not have been sold at all at that time. Having thus interfered to alter the mode of sale, he cannot now sever the transaction, and hold the sheriff liable for the conduct of his officer in a matter of which he himself controlled the commencement. There is a right in the execution creditor to rule the sheriff to return the writ, unless he has done some act which has discharged the sheriff from responsibility to him; the refusal, therefore, to allow the creditor to rule the sheriff must proceed on the ground that he has so discharged him from responsibility, from which it follows that under circumstances that would justify the refusal no action could be brought by him against the sheriff. The execution debtor has a

(1) 6 A. & E. 699. (2) 1 Chit. Rep. 613, n. (a).
(3) 1 Chit. Rep. 614, n.

similar right to rule the sheriff, and the same argument therefore applies in his case. But it is clear that such acts as the debtor has done here would, in the case of a creditor, disentitle him to rule the sheriff; they ought therefore to disentitle the debtor, and will consequently disable him from suing the sheriff: Chitty Pr. vol. i. p. 17 (12th ed.); *Harding* v. *Holden*. (1) The adjudication of bankruptcy having been made on the debtor's own petition, the assignee can stand in no better position than the debtor.

MARTIN, B. It is clear that this rule must be discharged. There has not been any contract with the officer, nor anything like a contract, to make him agent of the debtor, instead of agent of the sheriff. With respect to the earlier part of the business, no doubt the debtor excused the performance of the statutory regulations, but as to the negligence in the sale, there is no evidence that he ever relieved the sheriff from his duty of taking care that the goods should realize their fair price.

BRAMWELL, B. The defendant's case fails upon the facts. He ought to be able to persuade us that the goods were sold not under the writ, but under the authority of the debtor, suspending the authority of the writ. But we cannot come to the conclusion that there was any such agreement. The authority of the writ was not superseded, though it may, as between the debtor and the sheriff, have been modified to this extent, that the debtor in substance said to the officer: "If you will delay issuing the bills, and if you will postpone the sale, I will not complain or hold you liable for the consequences." But subsequently the officer did act under the writ, and with the same latitude as if his authority had never been qualified, and for his conduct at this latter period the sheriff is not relieved from responsibility by anything that has passed.

CHANNELL, B. I think the rule should be discharged, because I agree that there is no evidence of any act done by the debtor to discharge the sheriff. There was perhaps a modification of the officer's authority, and as to acts done by him, under circumstances to which the modification applied, the sheriff might be exonerated; but the officer was not in any way discharged from his

(1) 2 M. & G. 914.

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duty as officer to exercise care in the conduct of the sale, and the sheriff therefore remains liable for his negligence.

Rule discharged.

Attorney for plaintiff: *A. D. Smith.*

Attorney for defendant: *H. C. Barker.*

June 11.

LEE *v.* WILMOT.

*Debtor and Creditor—Statute of Limitations—*9 *Geo.* 4, *c.* 14, *s.* 1*—Acknowledgment.*

10 Q.B. 502
505, 515, 6,

The defendant being indebted to the plaintiff wrote to the plaintiff, before the debt was barred by the Statute of Limitations, a letter containing these words, "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week":—

Held, by Bramwell and Channell, BB. (Martin, B., dissenting), a sufficient acknowledgment in writing within 9 Geo. c. 14, s. 1.

To an action on a promissory note for 28*l.*, made by the defendant on the 20th of August, 1859, the defendant pleaded the Statute of Limitations. The action was commenced on the 19th of April, 1866.

At the trial, before Pigott, B., at Westminster, in Trinity Term, the plaintiff, in order to take the case out of the statute, put in evidence a letter written to him by the defendant on the 13th of August, 1863, which was as follows: "Dear Sir,—Your letter has reached me at last, after having been half over England. It is quite true that I have not sent you any money for years, but I really have none of my own. We just manage to exist on my wife's, at least on what is left of hers. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week. I remain, yours truly, F. S. Wilmot." The letter to which this was an answer was not produced, but its absence was not insisted on as an objection to the admissibility of the defendant's reply.

A verdict for 37*l.* for debt and interest was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, on the ground that the defendant's

letter was not a sufficient acknowledgment to take the case out of the statute.

Crompton having obtained a rule accordingly,

Wills shewed cause. This is a sufficient acknowledgment in writing within 9 Geo. 4, c. 14, s. 1. There are two classes of cases upon this subject: the one where there has been an absolute and unconditional acknowledgment of the debt, though with an appeal to the forbearance of the creditor, the other where the acknowledgment is limited by some qualification or condition. In both cases the debt is taken out of the statute; for if the acknowledgment is distinct, a promise to pay is implied: but if the acknowledgment is simple and absolute, the promise implied is a promise to pay on request; if conditional, a promise to pay according to the condition: *Tanner* v. *Smart* (1), *Smith* v. *Thorne*, per Parke, B. (2) That the present case is within the former class is shewn by *Cornforth* v. *Smithard* (3), where the words, "I am ashamed the account has stood so long," were held to be a sufficient acknowledgment, and not to be limited by words following them which asked for time; and the fact relied on by the Chief Baron in that case is also present here, viz. the fact that the letter was written before the debt was barred, when the debtor, not being in a position to impose terms, cannot be reasonably supposed to have meant to restrict his promise. The remark of Bramwell, B., in *Sidwell* v. *Mason* (4), is also applicable: "it seems to me a mistake has been made in several cases with respect to the expression of hope, in holding that, because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he was legally obliged to do, such an acknowledgment is not sufficient." A third class of cases, in which it has been held that there has been no sufficient acknowledgment, is illustrated by *Rackham* v. *Marriott* (5), and is characterized by the fact that in no part of the document is there any distinct acknowledgment of the existence of the debt.

Crompton, in support of the rule. To take the case out of the

(1) 6 B. & C. 603.
(2) 18 Q. B. at p. 143; 21 L. J. (Q.B.) at p. 201.
(3) 5 H. & N. 13; 29 L.J. (Ex.) 228.
(4) 2 H. & N. at p. 310; 26 L. J. (Ex.) at p. 409.
(5) 2 H. & N. 196; 26 L. J. (Ex.) 315.

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statute, the acknowledgment must be clear and unequivocal, for since it acts, not by reviving the old promise, but by creating a new one, it must be an acknowledgment from which this new promise may be implied: *Hurst* v. *Parker* (1); *Phillips* v. *Phillips*, per Wigram, V.C. (2); *Buckmaster* v. *Russell*, per Williams, J. (3) If, therefore, there is anything in the language inconsistent with that intention, the statute is not satisfied; here the debtor only offers to pay according to his ability. *Cockrill* v. *Sparke* (4), shews that the acknowledgment must be in direct terms.

[CHANNELL, B. There the reference to the debt by the surety was made with an entirely different view, and to enable the creditor to receive the dividends from the principal debtor's estate.]

The gist of the defendant's letter is a proposal as to the mode of payment, and the expression of a hope that he may be able to pay, and it therefore resembles the cases of *Rackham* v. *Marriott* (5) and *Hart* v. *Prendergast* (6), where such expressions were held insufficient; and on the other hand it differs from *Collis* v. *Stack* (7), for there the words were direct words of acknowledgment, though joined with a request for forbearance, whilst here there is a mere offer: see also *Smith* v. *Thorne*. (8) Further, whatever there was here in the nature of a promise, was made conditional by the words: "I will try to pay you a little at a time *if you will let me*," that is, if you will not sue me; and it ought to be shewn that the plaintiff assented to this: *Fearn* v. *Lewis* (9); see also *Cawley* v. *Furnell*. (10) It is also an objection that the defendant's letter, even if it is taken as clearly acknowledging anything, does not, in the absence of the letter to which it is a reply, shew what the debt is which is referred to: *Parmiter* v. *Parmiter*. (11)

[BRAMWELL, B. It is too late to raise that point; the letter should have been objected to as inadmissible without the other part of the correspondence.]

(1) 1 B. & A. 92.
(2) 3 Hare, 281, at p. 300.
(3) 10 C. B. (N.S.) at p. 749.
(4) 1 H. & C. 699; 32 L. J. (Ex.) 118.
(5) 2 H.&N. 196; 26 L. J. (Ex.) 315.
(6) 14 M. & W. 741.
(7) 1 H.&N. 605; 26 L.J. (Ex.) 138.
(8) 18 Q. B. 134; 21 L. J. (Q.B.) 199.
(9) 6 Bing. 349.
(10) 12 C. B. 291; 20 L. J. (C.P.) 197.
(11) 30 L. J. (Ch.) 508.

CHANNELL, B. I am of opinion that there was evidence here to take the case out of the statute, and that therefore this rule should be discharged. There is some difference of opinion amongst us as to the true construction of the document in question, but the difficulty arises entirely from the want of explicitness in its language, and not from any difference of opinion as to the principle which ought to govern our decision. I agree, that, to take a case out of the statute, there must be a promise or acknowledgment in writing, and I doubt whether the act meant two different things when it said "promise or acknowledgment." If there be a distinct acknowledgment it is not necessary that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which excludes that inference. The construction which I put on this letter is, that it does contain an acknowledgment from which a promise to pay may be inferred, and that there is nothing in it to exclude that inference.

BRAMWELL, B. I am of the same opinion, and for the same reasons. The letter contains words sufficient, if they stood alone, to make a plain acknowledgment of the debt; but it is said that because these words are accompanied by an excuse for previous default, and a pledge that the debtor will do his best to pay, they are deprived of this effect, not on the ground that the other words alter their interpretation, but that they shew no absolute promise to pay to have been intended. But it seems to me much better to decide the case on the ground on which my Brother Channell puts his judgment, that this is an unequivocal acknowledgment, not limited by a refusal or any other qualifying statement. I cannot adopt the view that it is a conditional offer.

MARTIN, B. In my opinion this letter is not a sufficient acknowledgment. I consider the law to be correctly laid down in 2 Wms. Saund. 64 h. n. (c), in the note to *Hodsden* v. *Harridge*: that "an acknowledgment operates only as evidence of a promise to pay; and accordingly, that upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but that where the party guards his acknow-

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ledgment, an implication will not arise. Thus, a refusal to pay will prevent the implication of a promise arising from such an acknowledgment; and a conditional promise to pay when able will prevent an absolute promise from being implied." I think the proper mode of deciding questions of this nature is, not by discussing other documents, but by giving a fair and candid construction to the one which is before us, and seeing whether, so construed, it contains a promise to pay. Now, if the letter stopped at the words "to get on," it is impossible to say that there would be any promise or acknowledgment, and when the debtor further says, "but I will try to pay you a little at a time if you will let me;" this means (the letter being written before the debt was barred), if you will not sue me I will do my best to pay you what I can. The fair and reasonable construction is, I think, that the debtor engages that he will do his best to endeavour to pay, that he will pay as he is able; and this excludes the implication of the absolute promise sued upon.

Rule discharged.

Attorneys for plaintiff: *Rickards & Walker.*
Attorney for defendant: *F. W. Blake.*

June 26.

LORD COLCHESTER AND OTHERS *v.* KEWNEY.

*Land tax—Exemption—Hospital—Construction—*38 *Geo.* 3, *c.* 5, *s.* 25.

In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) is contained an exemption from land tax of "any hospital," in respect of its site.

Commissioners, appointed by the Crown to administer a fund subscribed by the public for that purpose, founded, in 1857, an asylum for the maintenance and education of three hundred daughters of soldiers, sailors, and marines, dying in active service. The asylum was built and maintained entirely out of that fund, and solely for the benefit of the children, and was under the control of the commissioners:—

Held, first, that the asylum was not within the exemption in the act. Secondly, that it was not exempt as Crown property.

The exemption in the act only applies to institutions existing at the time when the tax was made perpetual.

Land previously chargeable with land tax is not exempted by becoming Crown property.

Semble, that such an institution is a hospital, within the meaning of that word

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in 38 Geo. 3, c. 5, s. 25, and, if existing at the time when the act was passed, would have been within the exemption.

Semble, that an institution so founded, maintained, and governed, is not Crown property. *Affd 2 Ex 253.*

THIS was a case stated without pleadings, raising the question whether the Victoria Asylum was liable to the payment of land tax.

The plaintiffs (Lord Colchester, Sir John Pakington, and the Hon. James Lindsay) are three of the royal commissioners of the patriotic fund, and are their trustees. The defendant is the land tax collector for the parish of Wandsworth, acting for the division of West Brixton in Surrey, within which division the Victoria Asylum is situated.

By a royal commission, dated the 7th October, 1854, the late Prince Consort, the plaintiffs, and others, were appointed to inquire into the best means of applying, according to the intentions of the donors, the sums of money subscribed by the public for the relief of the widows and orphans of soldiers, sailors, and marines, dying in active service; and to apply the same from time to time, as they, or any three of them, might think fit; and it was directed that the fund should be called the patriotic fund.

The commissioners, after expending a large portion of the fund in immediate relief, resolved to establish an institution for the education of three hundred daughters of soldiers, sailors and marines. In June, 1857, they purchased from Lord Spencer a piece of land on Wandsworth Common, which was conveyed to the plaintiffs, and to Lord Herbert (since deceased), and on this land they afterwards built the Royal Victoria Patriotic Asylum.

The land was bought, and the asylum built and endowed, wholly out of the patriotic fund, and is wholly used for the above-mentioned purpose, and no children are admitted, or are eligible for admittance, except the daughters of non-commissioned soldiers, sailors, and marines, dying in active service. The inmates are lodged and boarded in the asylum, and entirely maintained, clothed and educated there, out of a portion of the patriotic fund, set aside to the Royal Victoria Patriotic Asylum account, and invested in public securities under the control of the paymaster-general. The expenses of the hospital are paid out of the income of the endowment, and, in case of deficiency, out of the patriotic fund. The

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asylum is occupied and used, under the management of the commissioners, solely by the children, and the necessary officers and servants of the establishment, who are paid, appointed, and removed by the commissioners, for the sole benefit of the children, and for no other purpose.

In August, 1863, the asylum was assessed to the land tax at 37*l.* 10*s.* for the half-year; the plaintiffs claimed exemption, and appealed to the local land tax commissioners, who confirmed the assessment and dismissed the appeal. The plaintiffs still refused to pay, and the defendant having distrained, they paid the assessment and costs of distress, and brought the present action to recover the money so paid.

The question for the decision of the Court was, whether or not the asylum was absolutely exempt and free from being assessed and rated to the land tax, for or in respect of the site thereof, and the buildings within the walls and limits thereof. If the asylum was not so liable, judgment was to be for the plaintiffs for 37*l.* 10*s.* and costs. If it was so liable, judgment was to be for the defendant with costs.

May 28. *The Solicitor General* (*Sir R. P Collier*) (*Prideaux* with him), for the plaintiffs. First, the asylum is exempt as a hospital, under 38 Geo. 3, c. 5, s. 25. (1) That act was the last of the yearly

(1) The following are the sections of 38 Geo. 3, c. 5, referred to in the argument:—

38 Geo. 3, c. 5, s. 25. Provided that nothing in this act contained shall extend to charge any college or hall in either of the two universities [of Oxford or Cambridge], or the colleges of Windsor, Eaton, Winton, or Westminster, or the corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley, or any hospital [in England, Wales, or Berwick-upon-Tweed] for or in respect of the sites of the said colleges, halls, or hospitals [or any of the buildings within the walls or limits of the said colleges, halls, or hospitals] or any master, fellow, scholar [or exhibitioner] of any such college or hall, or any reader, officer or [master] of the said universities, colleges, or halls, or any masters or ushers of any schools [in England, Wales, or Berwick-upon-Tweed], for or in respect of any stipend, wages, [rents,] profits [or exhibitions] whatsoever arising or growing due to them in respect of the said several places or employments in the said universities, colleges, or schools; or to charge any of the houses or lands [which on or before the 25th day of March, 1693, did belong * to the sites of any college or hall * in England, Wales, or Berwick-upon-Tweed, or] to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas and Bethlehem

land tax acts; by 38 Geo. 3, c. 60, s. 1, the land tax as assessed by it was made perpetual; and by 42 Geo. 3, c. 116, s. 1, the latter act was hereby enacted, that all such lands, revenues, or rents belonging to any hospital or almshouse, [or settled to any charitable or pious use,] as were assessed in the fourth year of the reign of their late Majesties King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid; and that no other lands, tenements or hereditaments, revenues or rents whatsoever [then] belonging to any hospital or almshouse [or settled to any charitable or pious uses] as aforesaid, shall be charged, taxed, or assessed by virtue of this present act [towards the said sum to be raised in England, Wales, and Berwick-upon-Tweed as aforesaid;] anything herein contained to the contrary notwithstanding.

Hospitals, in the city of London and borough of Southwark, or any of them, or to the said corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley; or shall extend to charge any other hospitals or almshouses [in England, Wales, or Berwick-upon-Tweed,] for or in respect only of any rents or revenues [which, on or before the said 25th day of March, 1693, were] payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only.

s. 26 enacted that no tenants holding any lands or houses of "the said corporation, or any of the said hospitals or almshouses," should be exempted by the act; but that the houses and lands so held should be rated for "so much as they are yearly worth over and above the rents reserved and payable to the said corporation or to the said hospitals or almshouses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses"

s. 27 provided that the act should not exempt "any tenant of any of the houses or lands belonging to the said colleges, halls or hospitals, almshouses or schools, or any of them," who was bound by lease or contract to pay all rates, taxes, and impositions.

s. 28 provided that, in case any question should be made how far any lands or tenements belonging to any hospital or almshouse not exempted by name out of the act, ought to be assessed to the land tax, the same should be determined by the Land Tax Commissioners, whose determination should be final.

s. 29. Provided always, and it is

The first two sections existed in substance in the Land Tax Act of 4 Wm. & M. c. 1, as ss. 22 & 23, and occurred in various positions in all the subsequent acts. The parts of the principal section (s. 25) of 38 Geo. 3, c. 5, which are wanting in the corresponding section (s. 22) of 4 Wm. & M. c. 1, are indicated above by brackets. The history of the material alterations in it is as follows: the words "or any of the buildings within the walls or limits of the said colleges, halls, or hospitals," were first introduced in 10 Wm. 3, c. 9, s. 21; the words "which on or before the 25th day of March, 1693, did belong to" (the words in the ninth bracket as far as the first asterisk) were substituted for the word "belonging," and the words "which on or before the said 25th day of March, 1693, were" were introduced, in 1 Ann. c. 6, s. 65; in 1 Ann. st. 2, c. 1, s. 30, the words in the ninth bracket from the first to the second asterisk, viz., "to the sites of any college or hall," were added; and

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repealed, except so far as it makes perpetual the land tax. The question of rateability therefore turns on 38 Geo. 3, c. 5, s. 25, and on a comparison of that section with the corresponding section (s. 22) the words "in England, Wales, or Berwick-upon-Tweed," throughout the clause, were introduced in 6 Ann. c. 35, s. 21, that being the first land tax act passed after the Act of Union (6 Ann. c. 11), and the provisions relating to the land tax in Scotland being then placed in the latter part of the same act. Besides this, the clause was varied from time to time by the insertion of specific charities, which were afterwards dropped out, by the limitation (in 5 Wm. & M. c. 1, s. 19) of the exemption at the end of the section, to almsmen and almswomen whose annual maintenance and profits should not exceed in the whole 20*l.*, which also was omitted in 9 Wm. 3, c. 10, s. 21, and by the addition in 8 & 9 Wm. 3, c. 6, s. 38, after the word hospital, of the words "or almshouse, or any free school," which were struck out again in 9 Wm. 3, c. 10, s. 21. In the 6 Ann. c. 35, s. 21, and thence to 13 Ann. c. 1, s. 24, the clause stands as it does in 38 Geo. 3, c. 5, s. 25, except that the word "master," where it is inclosed above in brackets, has at some period between the two last-mentioned acts been substituted for the word "minister," which up to the 13 Ann. occurs in all land tax acts.

The act of 4 Wm. & M. c. 1, has been referred to because in 10 Wm. 3, c. 9, s. 6, and ever since up to the 38 Geo. 3, c. 5, s. 7, the commissioners have been directed in making their assessments to have regard to the proportions in which the districts were rated in the assessment made under that act. But in the previous land tax acts similar clauses occurred, and in that of 1 Wm. & M. c. 3, s. 17, the exemption of Christ's Hospital, &c., was limited to the revenues to be applied to the use of the poor, the words "or shall extend to charge any other hospital or almshouse," together with the word "almshouses" at the end of the clause being omitted. In 1 Wm. & M. c. 20, s. 19, and in 1 Wm. & M. sess. 2, c. 1, s. 20, the institutions mentioned in the earlier part of the section were included in this limited exemption; in 2 Wm. & M. sess. 2, c. 1, s. 16, they were again omitted; in 3 Wm. & M. c. 5, s. 17, the words "or any other hospital or almshouse" were inserted; and finally in 4 Wm. & M. c. 1, s. 22, the words "nor to extend to charge" were inserted, and "or" was omitted, and the charity for the widows and children of clergymen and Bromley College were also added to the list of exempted institutions. These two charities had once before, in 1 Wm. & M. sess. 2, c. 1, s. 20, obtained the same favour, and in the same section also the words "or almshouse or any free school," had been inserted in the place in which, as has been already stated, they appeared in 8 & 9 Wm. 3, c. 6, s. 38.

The 27th section of 38 Geo. 3, c. 5, first appears as s. 23 of 9 Wm. 3, c. 10.

Clauses answering to 38 Geo. 3, c. 5, ss. 28, 29, first occurred as ss. 32, 33 in 2 & 3 Ann. c. 1, and were in the same words, except that in the latter clause the words "or settled to any charitable or pious use," and the word "then," appear first in 9 Ann. c. 1, s. 30, and that the words "towards the sum to be raised in England, Wales, and Berwick-upon-Tweed," were first inserted in 6 Ann. c. 35, s. 25, for the same reason which caused the insertion of similar words in s. 21 of the same statute.

The above-mentioned acts of William and Mary, William, and Ann., are referred to in the Record Commissioners' edition of the statutes.

of 4 Wm. & M. c. 1, as the assessment of the latter act has almost ever since been directed to be followed. In that act "hospitals" are exempted; and from the particular institutions which are exempted by name in the same section, it appears that the asylum is within the meaning of the word. Lord Coke says obiter in the case of *Sutton's Hospital* (1), that there can be no legal hospital unless the poor of the hospital are incorporated; he vouches no authority for this, and appears to lay it down only in order to get rid of the power of visitation by the patron (which would follow from calling it a lay hospital) in favour of visitation by the governors. But whether that statement be true or not, it is clear that this cannot have been the meaning of the legislature, who must have used the word in its current sense, and that included any institution dedicated to the relief of the poor, at least where those receiving relief reside within its walls. Dr. Johnson, in his dictionary, defines a hospital as, "a place built for the reception of the sick, or support of the poor," and Du Cange, in his glossary, gives as one meaning of "hospites" in mediæval latin, "pauperes" (see also ibid. sub voc. "hospitalis"). The instances of Sutton's Hospital (the Charterhouse), and of Christ's Hospital and Bridewell Hospital (2), which are mentioned in the act itself, shew that the meaning is restricted neither to what Lord Coke calls a legal hospital, nor to the institutions for the cure of disease, which alone are commonly so called at the present day, but that it embraces any such as would be included in the definitions of Johnson and Du Cange; and abundant instances prove that this was the meaning borne by the word at that time.

Assuming it to be a hospital, the fact that it has been founded since the 38 Geo. 3 does not prevent it from enjoying the exemption. In *Harrison* v. *Bulcock* (3), which was decided in 1788, it was held that lands which had been made part of the site of a hospital founded since 1693, were exempt; and in *All Souls College* v. *Costar* (4), decided in 1804, that decision was followed with respect to lands added to a previously existing college, since that date, but before 1797. It is plain, therefore, that while the annual land tax acts continued, new foundations, and lands added to old ones,

(1) 10 Rep. 31 a.
(2) See 10 Rep. 31b.
(3) 1 H. Bl. 68.
(4) 3 B. & P. 635.

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enjoyed the benefit of the exemption, and it is submitted that no difference is made by 38 Geo. 3, c. 60, making the tax perpetual. This would be to assume that the intention of the legislature was changed towards such institutions without any alteration in their language, and in such a case it may be said that clear words are needed to impose the tax.

Secondly, if not otherwise exempt, the asylum is privileged as Crown property. It is founded in pursuance of a royal commission, and is governed by the commissioners, Her Majesty being the visitor: *Attorney General* v. *Hill.* (1)

Mellish, Q.C. (*Philbrick* with him), for the defendant. First, the present institution is not either within the strict legal meaning, or the popular meaning of the word "hospital"; for even if it were conceded that popularly a hospital is a place for the "support of the poor," the asylum does not answer that description, but is mainly devoted to the purpose of educating the young. The ordinary meaning, however, is rather "a place for the relief of the sick": Co. Litt. 342 a. But even assuming it to be a hospital, it cannot claim the privilege, since it has been founded and its site acquired since the land tax was made perpetual. Under that act, the amount of the tax which each district, as well as each county was to bear, was finally fixed; and the effect of allowing fresh land to be now taken out of taxation would be to throw a heavy burden on neighbouring property. This was felt seriously, as appears from Lord Alvanley's remarks in *All Souls College* v. *Costar* (2), even whilst the commissioners had a power of remodelling the assessment; but it is a much greater burden now that the amount to be contributed by each district is fixed, so that the deficiency caused by the exemption has to be made good out of a narrower area.

[BRAMWELL, B. It is an argument in your favour that if the legislature spoke of existing institutions, they spoke of what they knew, and could calculate the effect of the exemption; and with yearly acts this would be so in substance, even if they included future foundations; but if, when they made the tax permanent, they included future foundations, they dealt with what they could have no knowledge of.]

(1) 2 M. & W. 160. (2) 3 B. & P. at p. 642.

Further, the tax was made permanent with a view to its redemption, which was provided for by the same act (38 Geo. 3, c. 60). The scheme of the act was to give an inducement to its redemption, and a facility for its calculation, by making it as far as possible a permanent and ascertained charge; but though this would be consistent with retaining the existing exemptions, it would not be consistent with allowing new ones to be added, which would vary the amounts within the districts.

Secondly, this is not Crown property; it was not purchased and is not supported by public funds in the strict sense, but by a number of private subscriptions voluntarily contributed for this purpose, and to which the donors assign the destination. But, if it were, yet the land having been bought subject to the tax, it would by the above reasoning still remain liable to it as to any other fixed charge.

The Solicitor General, in reply.

Cur. adv. vult.

June 26. The judgment of the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

CHANNELL, B. The question for our decision in this special case is, whether the site of the Royal Victoria Patriotic Asylum is liable to be assessed to land tax. Exemption is claimed by the plaintiffs, who are the trustees of the asylum, on two grounds; first, that this asylum is a hospital, and therefore exempt by the 25th section of the 38 Geo. 3, c. 5; secondly, that it is Crown land, and therefore exempt. On the part of the defendant these propositions are disputed, and it is further contended, that even if this were a hospital within the meaning of that word in the section in question, yet it was not in existence in the thirty-eighth year of Geo. 3, and that the exemption only extends to institutions then existing.

The facts are fully set out in the case, and it will not be requisite further to refer to them. It will, however, be necessary to examine the statutes imposing the land tax, to shew how the law now stands, and the successive changes that have been made.

The tax appears to have been first imposed as an annual tax in the time of William and Mary, and to have been continued by

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several successive acts of parliament. Those acts imposed, not only the tax now known as the land tax, but also a tax on personal property and salaries, somewhat analogous to the present income or property tax, and from the time of the 4 & 5 of Wm. & M. they contained a clause exempting hospitals from its operation, in somewhat similar terms to that hereafter referred to. These annual acts appear to have been passed in much the same terms until 1797, the date of 38 Geo. 3, c. 5, the last annual act.

The 25th section of that act provides, that nothing in the act shall extend to charge any college or hall in either university, or certain colleges named, or the corporation of the sons of the clergy or the college of Bromley, "or any hospital in England, Wales, or Berwick-upon-Tweed, for or in respect of the sites of the said colleges, halls, or hospitals, or any of the buildings within the walls or limits of the said colleges, halls, or hospitals." The section then proceeds to provide for the exemption of persons connected with such institutions from the tax on their salaries, and also for the exemption of lands which in 1693, the date of the act 4 Wm. & M. had formed part of the site of any college or of certain specified institutions, and also that the act should not charge "any other hospitals or almshouses," in respect of lands the rents of which in 1693 had been applicable solely to the relief of the inmates.

Now the first question that arises is, whether, if this asylum had been in existence at the passing of this act, the trustees could have claimed exemption. It is objected that they are not incorporated, and that there can be no hospital without incorporation, and no doubt the old authorities tend to shew that an hospital must be incorporated. But they shew something more, for Lord Coke says in *Sutton's* case (1), that there is no legal hospital except where the poor persons benefited are themselves incorporated; and he says that where the corporate succession is vested in trustees to effectuate the purposes of the institution, that is no legal hospital. It seems, however, tolerably clear that a legal hospital in that sense is not meant, when the word *hospital* is used in this section; for, towards the end of the section, the words "other hospitals" are followed by the names of some particular hospitals, some of which

(1) 10 Rep. 31 a.

seem not to be incorporated in such a manner as to make them legal hospitals under this definition. If, then, we understand that the word *hospital* in the section does not mean strictly a legal hospital, is there any reason for supposing there need be any corporation at all? It seems rather more reasonable to hold that the word is used in a popular sense only, and that any institution which, though not in a strictly legal, might in a popular, sense be called a hospital, might claim exemption. But some doubt may arise whether, even upon this view, this institution would be a hospital, by which word we understand rather an institution for the relief of the sick or aged than for the maintenance and education of children. We do not speak of a hospital for orphans.

Upon the whole, we are inclined to think that, if the institution had been in existence at the time of the passing of the act 38 Geo. 3, c. 5, it might have claimed exemption. But this is not so clear as to make it unnecessary to consider the position of a subsequently founded hospital of this character, and the course of the subsequent legislation. In the same session (38 Geo. 3) was passed another act (c. 60), which enacted that the sums charged by the previons act (c. 5) on counties, towns, and places, in respect of land within the same, to be raised, levied, and paid within a year, should be raised, levied, and paid yearly for ever; and the several powers, provisions, clauses, &c., of the former act should, except as in the second act altered or varied, be in full force as if repealed and re-enacted in that act; but that all this should be subject to redemption as therein provided. By subsequent statutes the provisions for redemption were from time to time altered, repealed, re-enacted, and consolidated; but the scheme remained the same, and the alterations were principally of the machinery and regulations for carrying it into effect.

Now, one object of the legislature in passing the act was to support the public credit by imposing a fixed charge on land, on the strength of which money could be borrowed, and to relieve the country of a portion of the existing debt on advantageous terms. Provision was made for redemption of the tax by transferring to the commissioners for the reduction of the national debt a sum in consols, the income of which should exceed by one-tenth the tax to be redeemed. At this time the funds were

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greatly depreciated as compared with other securities, and especially with land. A permanent charge of 10*l.* a year upon land would, therefore, be of greater value in the market than a sum producing 11*l.* a year in the funds. It would, therefore, if the then imposed tax was to be permanent, be to the interest of landowners to redeem; and upon their doing so the revenue would be benefited to the extent of one-tenth of the tax redeemed. It was, therefore, the policy of the legislature to encourage redemption. That this was so we see from the extensive powers given to persons having a limited interest only to raise money to redeem the tax; from other inducements held out to landowners to redeem, and from the fact that, upon refusal of the owners, third persons might purchase the tax, retaining it as a charge payable to themselves. But no one would have redeemed the tax unless it had been made a permanent charge upon the land, not likely ever to be much less in amount, and not to be got rid of except by redemption. If that were the case, the redemption would naturally increase the market value of the land, and would do so, as we have shewn, to a greater extent than the sum required to be expended in the redemption. If, however, the land was to be liable to the tax in the hands of one purchaser, but not of another, the value of the land to sell would not be increased in proportion to the outlay for redemption. To carry out the policy of the act, therefore, we should expect to find that no new or shifting exemptions could arise or come into effect after the tax became permanent.

The effect of the acts on several points was explained in *The Queen* v. *The Land Tax Commissioners.* (1) Upon each district separately assessed a fixed quota was to be charged. That was not to be altered, although before levy the amount of tax redeemed within the district was to be deducted, and the remainder only levied. This was to be levied on the lands not exonerated by redemption. These lands were to be assessed yearly by an equal pound rate, sufficient to produce the required amount.

We see, therefore, from this, in the first place, that the amount of tax payable on any particular portion of land would increase or decrease, not according as the value of land increased or decreased absolutely, but according as it increased or decreased relatively to

(1) 2 E. & B. 694.

the other lands in the district not exonerated. And, as any owner who was about to improve his land to such an extent as to have any effect on the rest of the district, might be expected first to redeem the tax, no person could ever expect that the amount of tax upon his land would ever be sensibly diminished, although he would know that if he improved without taking the precaution of redeeming, the tax would be increased. We see then that this inducement for redemption, viz. that no loss was likely to be incurred, was actually held out by the legislature.

In the next place we see that if any portion of land chargeable with the tax came into the hands of a proprietor having a valid claim of exemption, a greater burden would be thrown upon the remainder of the district; for the amount to be raised would be the same as before, and the land on which it was to be charged less. This of itself is a strong argument for supposing that all exemption must attach at the time these quotas were thus permanently fixed, and must in all changes of ownership follow the land, and not the proprietor. As long as the tax was imposed annually, although the legislature in fact imposed the same quota on each district as they had done before, it must be taken that this was done deliberately and after consideration of all the changes that had taken place in the ownership of property since the last act. Accordingly, we find in two cases arising under the temporary acts, viz. *Harrison* v. *Bulcock* (1), and *All Souls College* v. *Costar* (2), that it has been held, with respect to additions to hospitals and colleges which had been made since exemption was first given, but before the act imposing the tax under which the assessment complained of was made, that such additions were exempt. The distinction between those cases and the present was noticed in one of them, the *All Souls College* case, by the Chief Justice of the Common Pleas, Lord Alvanley, who says that, with respect to colleges founded since the land tax was made perpetual, he would say nothing. The inference we are disposed to draw from what was said in that case is, that the important thing to see in construing the exemption is, whether or not the land was within the exemption at the time of the passing of the act imposing the tax. In that

(1) 1 H. Bl. 68. (2) 3 B. & P. 635.

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case it was, in the present it was not. Considering, therefore, the hardship on other proprietors in the district which would be caused by shifting exemptions, coming into operation on a change of ownership, together with the evident policy of the act to make the charge on land a permanent one, with a view to encouraging its redemption for the benefit of the revenue, we think we should hold that there can be no exemption in the case of lands not exempt when the tax was made permanent. The same conclusion would, we think, necessarily be drawn from a strict construction of the words of the exception; for "any hospital" must mean any existing hospital.

Then the further question arises, whether this asylum is exempt as Crown land; but to this we think the same reasoning will apply. There is, indeed, very great doubt whether, supposing this asylum to have been in existence in 1797, it would have been exempt on this ground, viz. as Crown land. It is true the commissioners were appointed by the Crown, and to some extent for public purposes, but it was mainly to administer funds contributed for a particular purpose by individuals; and all taxes or other imposts charged upon them would be payable from these funds, and not from the public purse. But however that may be, we think that these lands, having been chargeable with land tax when belonging to Lord Spencer, as we presume to have been the case, although it is not distinctly stated, would be chargeable still in the hands of the Crown if directly purchased for the Crown. The case quoted to shew that Crown lands are not chargeable with land tax (*Attorney-General* v. *Hill*) (1), seems to us to favour this view rather than the contrary, for it was distinctly found in that case (2) that the assessment complained of on Deptford Dockyard was for land which had formed part of the dockyards when the land tax was made perpetual. This shews that, in the opinion of the late Mr. Justice Wightman, who was then counsel for the Crown, it was a material point in order to make out the exemption. It may be observed that the effect of holding that the Crown must pay the land tax chargeable on land which it may purchase is not really to tax the Crown, but merely to make the Crown pay the market price for land purchased. If the tax had

(1) 2 M. & W. 160. (2) At p. 163.

been previously redeemed, of course the purchase money would have been larger, and the difference between the purchase money in the two cases would be gained by the Crown at the expense of the other proprietors of the district, not at the expense of the public revenue, whenever it purchased lands on which the tax had not been redeemed, if the exemption claimed were to be allowed. If there were any provision for reducing the amount of the tax to be levied on the district, of course the case would be different.

There may be some difficulty in enforcing payment against the Crown, and we do not say that all or even any of the remedies provided for ordinary cases could be resorted to. We do not, however, think that this shews that the lands would not be still chargeable, or that an assessment, in which part of the quota to be levied on the district was assessed on Crown lands chargeable before they became Crown lands, would not be a good one.

For these reasons we think that our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Sweeting & Lydall.*

Attorneys for defendant: *Batt & Son.*

ATTORNEY GENERAL TO THE PRINCE OF WALES *v.* CROSSMAN.

June 26.

Practice—Venue-Prerogative—Duchy of Cornwall.

An information was filed by the Attorney General to the Prince of Wales, to recover dues payable in Devon to the Prince, as Duke of Cornwall, and the venue was laid in Middlesex. On an application by the defendant to change the venue to Devon, it appeared that all the witnesses to facts resided there; but that, as the defendant disputed that the dues were payable to the Prince in right of the Duchy, the records of the office of the Duchy in London would have to be produced at the trial.

The Court, on the above facts, and on the ground that the Crown would have a right to allege an interest in the suit, and to claim a trial at bar, refused the application:—

Semble, that such a suit is in the nature of a transitory action, and that the Crown filing the information, would be entitled to lay and keep the venue where it pleased.

Semble, also, that the Prince of Wales, suing as Duke of Cornwall, would have the same right.

THIS was an application on behalf of the defendant to change the venue, in a suit commenced by an information filed in this

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court by the Attorney General of the Prince of Wales, Duke of Cornwall, against Thomas Crossman. The information alleged that the defendant was indebted to the Prince in the sum of 10*l.* for moneys due and payable to the Prince for certain customs and dues chargeable in respect of goods imported by the defendant into, and for breaking bulk from ships arriving from abroad within, the outport of Torquay, in the waters of Dartmouth, parcel of the ancient possessions of the Duchy of Cornwall, in the county Devon; which moneys were to be paid by the defendant on request; and that the defendant had not paid the said sum or any part of it; and prayed the advice of the Court in the premises. The venue was laid in Middlesex.

The defendant applied to change the venue to Devon, and made an affidavit that the cause of action arose there, and that all the witnesses of fact resided in Torquay or the immediate neighbourhood. The solicitor for the Duchy made an affidavit to the effect that the suit was brought for the recovery of certain dues part of the ancient revenues of the Duchy; that he was informed and believed that the defendant intended to defend the suit, upon the ground that the dues were not payable to the Prince in right of the Duchy; that, having searched the records of the office of the Queen's Remembrancer, he had not been able to find any precedent of a change of venue at the instance of a defendant in a personal suit commenced by information, either by the Crown or the Prince of Wales suing in right of the Duchy, and that it had been always the practice in such suits to lay the venue in any county which the Attorney General for the Crown or Duchy might select. These affidavits were not filed, but were referred to and used on the argument. The application had originally been made at chambers, before Channell, B, who referred the matter to the Court.

White moved to change the venue to Devon, and obtained a rule, against which

Karslake, Q.C., and *Garth*, shewed cause in the first instance. This is not an action by the Prince of Wales, but an information filed by him in the Exchequer in respect of the Duchy of Cornwall, and for the present purpose it must be assumed to have

been properly filed. His power to sue by information is however established by the *Attorney General* v. *Mayor of Plymouth* (1), *Attorney General to the Prince of Wales* v. *St. Aubyn* (2); in this respect he has the prerogative of the Crown, which has an alternate fee with him in the Duchy; and his interest is so far identified with that of the Crown, that, on his death pending a suit, that suit may be taken up and carried on by the Crown coming into possession of the Duchy, as was actually done in the first case cited. The interest of the Crown is in immediate succession to his, the Duchy not descending on the death of the Prince of Wales to his eldest son, but reverting to the Crown: see *The Prince's Case* (3); *Attorney General* v. *Mayor of Plymouth* (4); *Attorney General to the Prince of Wales* v. *St. Aubyn* (2); in respect of the Duchy, therefore, he is on the same footing as the Crown, and may sue with the same rights. One of these rights of the Crown is in all transitory actions to lay the venue where it pleases, and to retain it there: *Attorney General* v. *Smith* (5); this was originally the right of every plaintiff, his power being first controlled by 6 Rich. 2, c. 2, which aimed at compelling him to bring his action in the county where the cause of action arose; and on the equity of this statute was afterwards founded the practice of changing the venue upon the application of the defendant, or ultimately of either party: see *Attorney General* v. *Churchill.* (6) Tidd's Practice, vol. i. p. 601. But the Crown, not being named, is not bound by the statute (which besides refers to actions only and not to informations), nor by this practice, and therefore retains the same power, which is also enjoyed by the Prince of Wales suing in right of the royal possession of the Duchy. [They also referred to 28 & 29 Vict. c. 104, s. 46, and the rules on the revenue side of the Exchequer, 1860, 1861, 1863.] But supposing the defendant entitled to make this application, the balance of convenience is against the change of venue; the right to the dues being disputed, the case will mainly turn on the old records of the Duchy, which are all in London, and which, if the

(1) Wigh. 134.
(2) Wigh. 167, 238, 247, 258.
(3) 8 Rep. 1, 27; and see documents in app. to Concanen's report of *Rowe* v. *Brenton.*
(4) Wigh. 134, 150.
(5) 2 Price, 113.
(6) 8 M. & W. at p. 193.

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defendant succeeds, will have to be sent down in the custody of the officers to Devonshire. Moreover, the Crown may allege an interest in the suit, and require a trial at bar, which would defeat the defendant's purpose: *Rowe* v. *Brenton.* (1)

White and *Channell*, in support of the rule. It is decided in *Attorney General* v. *Churchill* (2), that the privilege which the Crown has to lay the venue where it pleases is confined to personal actions, meaning by personal actions all such as are not local; but the present suit, which, though in form for debt, is, in fact, for tolls, is in substance a local action, and is therefore not within the privilege. It can make no difference that its form is not that of an action but an information; the reason of the rule, and therefore the rule, are the same in both cases. Even if the Crown were suing, therefore, the privilege would not be made out, and it is not necessary to bring precedents in support of the application, for it lies on those who claim the prerogative of excluding the defendant from his common right, to prove it clearly. But this is still more necessary, where the prerogative of the Crown is claimed on behalf of another person than the sovereign.

But even supposing the Crown to have the right claimed, and the Prince also to have it in respect of the Duchy, the Court will, on the ground of convenience, change the venue against the claim of privilege. An instance of change of venue from Middlesex, where an attorney was plaintiff, is mentioned by Dolben in *Pye* v. *Leigh* (3), and it was done against the privilege of peerage in *Earl of Shaftesbury* v. *Craddock*, and *Earl of Shaftesbury* v. *Graham* (4), and even in a case of scandalum magnatum mentioned there.

[*Karslake, Q.C.*, referred to two cases of scandalum magnatum, where an application for a change of venue was refused, although grounds of convenience were alleged. *Lord Stamford* v. *Nedham* (5) and the *Marquis of Dorchester's* case. (6)]

(1) 3 M. & R. 133; 8 B. & C. 737.
(2) 8 M. & W. 171.
(3) 2 W. Bl. at p. 1066.
(4) 1 Ventr. 363, 364; Skin. 40, 43; Sir T. Jones, 192; 2 Show. 197.
(5) 1 Lev. 56.
(6) 2 Mod. 215; see 21 Vin. Ab. 132, pl. 11, and the case of *Rickaby* v. *Wilson*, in Serjeant Hill's MSS. in Lincoln's Inn Library. In this action, which was brought against the defendant, the member for Cumberland, for three days' treating at the last election, the venue was laid in Yorkshire, and the defendant, in Mich. Term, 19 Geo. 2, moved to change it to Cumber-

It is submitted that the arguments of convenience are here in the defendant's favour, and with respect to the right to a trial at bar, no such application is recorded to have been ever made on the part of the Prince of Wales; *Rowe* v. *Brenton* (1) was tried at a time when there was no Prince of Wales, and the Duchy was in the possession of the Crown.

Cur. adv. vult.

June 26. The judgment of the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

CHANNELL, B. This was an information filed by the Attorney General for His Royal Highness the Prince of Wales, Duke of Cornwall, to recover certain port dues alleged to be due from the defendant, claimed by the Duchy in respect of goods brought into and landed at Torquay, which is alleged by the Attorney General for the Prince to be a member of the port of Dartmouth (referred to in Hale de Portibus Maris, p. 48). The venue in this information is laid in Middlesex.

Application was made by the defendant to a judge at Chambers, to change the venue to the county of Devon.

This application was supported by an affidavit, which, if made

land, on an affidavit that the cause of action arose there. A rule to shew cause being granted, the plaintiff opposed it on the ground of the defendant's influence in Cumberland, and because plaintiff's creditors were pressing him, and one of his witnesses must in June go to Ireland. The defendant on the other hand alleged that both parties lived in Westmoreland, that he must bring many witnesses sixty miles into Yorkshire, and that, as he had privilege of parliament, the cause would probably in any case not be tried at the Lent assizes. The case of the *Earl of Shaftesbury* and *Knight's* case, Salk. 670, were cited. Willes, C.J., said he did not like the case of *Lord Shaftesbury*, and it should have no weight with him; and Parker and Burnett, JJ., said that it was a matter of discretion to change the venue or not, which discretion was governed only by the rules of justice. That they never changed the venue to Pool, Hull, Canterbury, and such towns as are counties of themselves, because we don't know the year in which the assize will be held there. That it has not been usual to change the venue into Bristol, Westmoreland, and other counties, where the judges go but once a year, in a Michaelmas or Hilary Term, by reason of the delay; and for this reason, as well as because of plaintiff's witness that must go to Ireland, and the earnestness of plaintiff's creditors, sworn in plaintiff's affidavit, the Court now refused to change the venue, and discharged the rule for shewing cause.

(1) 3 M. & R. 133; 8 B. & C. 737.

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in an ordinary action between subject and subject, and not answered, would have been sufficient to entitle the defendant to have the venue changed, on the ground that the cause of action arose within the county of Devon. It would still, however, have been open to the judge in such an action to have retained the venue in, or restored it to, Middlesex, notwithstanding the cause of action arose in the county of Devon, upon being satisfied upon affidavit that, on the score of saving expense, or some manifest convenience, it was proper that the trial should take place in Middlesex. In the present case the judge at chambers, on certain objections being made on behalf of the Attorney General for the Prince, referred the application to the Court.

Accordingly, in the last term, Mr. Meadows White, on the part of the defendant, obtained a rule to change the venue to Devon, against which cause was shewn in the first instance by Mr. Karslake and Mr. Garth, on behalf of the Attorney General. It was contended that the Court had no power to change the venue in this case, that the Attorney General of the Prince of Wales, Duke of Cornwall, is, in cases affecting the rights of the duchy, in the same position as the Attorney General for the Crown, and that they both have the right, not only to lay the venue where they please, but to keep it there. It was further contended, that the application of a defendant by motion to change the venue, arose upon the equity of the statutes of Rich. 2, and Hen. 5, and that these statutes did not bind the Crown, the Crown not being named therein: see the judgment of this Court, delivered by Parke, B., in the case of *Attorney General* v. *Lord Churchill* (1), where the origin of the practice of changing the venue in actions is explained; see also Tidd's Practice (9th ed.), vol. i. p. 601. It was further contended that the statutes applied to actions only, and not to informations.

We are agreed that it is for the officers of the Crown to make out clearly the prerogative, in any case where they claim to be on a different footing from the subject, as regards procedure in any litigation. This was in effect laid down in the case before referred to, viz. *The Attorney General* v. *Lord Churchill.* (2) We think that, though the Attorney General for the Crown may not have a

(1) 8 M. & W. at p. 193. (2) 8 M. & W. 171.

right in all cases not only to lay, but also to retain, the venue where he pleases, that in an information such as the present, which is a suit in the nature of a transitory action, he would have the right.

It would not necessarily follow that the Attorney General for the Prince of Wales would have the same right. The authorities cited to us to shew that he would were—*The Attorney General* v. *The Mayor of Plymouth* (1); *The Attorney General to the Prince of Wales* v. *St. Aubyn* (2); Rules on the revenue side of the Exchequer, June, 1860 (rule 140), November, 1861, and November, 1863; and the Crown Suits Act, 28 & 29 Vict. c. 104. *Rowe* v. *Brenton* (3) was also referred to.

We think that, in this case, the Attorney General to the Prince of Wales must be taken to be in the same situation as the Attorney General to the Crown. But it does not appear to us absolutely necessary in the present case to decide whether, in the case of an information such as the present, if filed by the Crown, the Crown would have a right to lay and keep the venue where it pleased; nor whether, if as against the Crown, the venue could not be changed on motion, the Crown not being bound by the statutes and practice referred to, the same rule would apply to the Attorney General for the Prince.

For the case was argued before us on the ground of convenience, as well as on the points we have noticed. The facts on which the argument as to convenience or inconvenience proceeded were not stated on affidavit, at least no affidavit has been filed, but were referred to by the counsel on each side with the sanction of the other. For the defendant, was urged upon us the inconvenience and expense of bringing up witnesses from Torquay to London to attend the trial. On the other hand, it is clear from the facts stated to us by the counsel for the Attorney General, and not disputed by the defendant's counsel, that the question to be tried must depend, to a considerable degree, upon documents and records, which would be produced by the officer of the Duchy no doubt more conveniently in Middlesex and London; nor was it disputed by the defendant's counsel that the Attorney General

(1) Wigh. 134. (2) Wigh. 167. (3) 3 M. & R. 133; 8 B. & C. 737.

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might allege such an interest in the Crown as to entitle him to appear and claim a trial at bar.

The inconvenience of bringing a Devonshire jury to Middlesex for a trial at bar at Westminster would be great, and would go a long way to counterbalance the inconvenience of many of the witnesses residing at Torquay. We think, then, that the Court ought not to interfere to change the venue, and that the rule should be discharged.

BRAMWELL, B. I wish to add, that in my opinion, when the nature of the application is looked at, no question of prerogative arises. The application was made and was insisted on, upon grounds of convenience, and the Crown, though it asserts its right absolutely, yet also says that it would be more convenient to try the cause in London. As far as I can judge, the balance of convenience is not such that we should interfere with the right of the plaintiff to try where he pleases. But, without more consideration I should be sorry to lay down the rule that the Crown has, in every such case, a right to lay and keep the venue where it will.

Rule discharged without costs.

Attorney for the Prince of Wales: *A. G. Lloyd* (*Solicitor to the Duchy of Cornwall*).

Attorneys for defendant: *W. & H. P. Sharp.*

END OF VOL. I.

REGULÆ GENERALES.

EASTER TERM, 1866.

(12 Jur. N.S. 842. 1864)

RULES OF COURT FOR REGULATING THE PROCEDURE AND PRACTICE IN SUITS BY ENGLISH INFORMATION.

The Right Honourable Sir Frederick Pollock, Knight, Lord Chief Baron of Her Majesty's Court of Exchequer, and Sir Samuel Martin, Knight, Sir George William Wilshere Bramwell, Knight, Sir William Fry Channell, Knight, and Sir Gillery Pigott, Knight, Barons of the same Court, do hereby, in pursuance and execution of the power given them by "The Crown Suits, &c., Act, 1865," and of every or any other power or authority enabling them in this behalf, order and direct in manner following:

Rule I.

Printing of Informations.

1. *Consolidated Chancery Orders*, IX. 3, p. 37.—Informations shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, in pica type, leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two and a half inches wide, and dates and sums occurring therein shall be expressed in figures instead of words. Every information shall be divided into paragraphs, numbered consecutively.

2. *Ib.* XL. 19, *and* p. 199, *Rule* 4.—*Ib.* p. 132.—The payment to be made by a defendant for such printed copies of the information as he requires, shall be at the rate of one halfpenny per folio of 72 words.

Rule II.

Service of Copy of Information and Appearance.

1. *Ib.* X. 3.—Where a defendant within the jurisdiction of the Court is served with a copy of an information in manner provided by "The Crown Suits, &c., Act, 1865," he must appear thereto within eight days after the service of such copy.

2. *Ib.* X. 4.—Where any defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, is, when within the jurisdiction of the Court, duly served with a copy of the information, in manner provided by "The Crown Suits, &c., Act, 1865," and refuses or neglects to appear thereto within eight days after such service, the informant may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the Queen's Remembrancer to enter an appearance for such defendant, and, no appearance having been entered, the Queen's Remembrancer shall enter such appearance accordingly, upon being satisfied by affidavit that the copy of the information was duly served; and after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the Queen's Remembrancer is not hereby required to enter such appearance, the informant may apply to the Court or a Judge for leave to enter such appearance for such defendant, and the Court or Judge being satisfied that the copy of the information was duly served, and that no appearance has been entered for such defendant, may, if it seem fit, order the same accordingly.

3. *Ib.* X. 5.—Any appearance entered at the instance of the informant for a defendant, who at the time of the entry thereof is an infant or a person of weak or unsound mind, unable of himself to defend the suit, shall be irregular and of no validity.

4. *Ib.* VII. 13.—Where, upon default made by a defendant in not appearing to or not answering an information, it appears to the Court or a Judge that such defendant is an infant or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the Court or a Judge may,

upon the application of the informant, order that some proper person be assigned guardian of such defendant, by whom he may appear to and answer or appear to or answer the information and defend the suit. But no such order shall be made unless it appears on the hearing of such application that a copy of the information was duly served in the manner provided by "The Crown Suits, &c., Act, 1865," and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the information, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such copy of the information, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service.

5. *Ib.* X. 6.—Where the Court or a Judge is satisfied by sufficient evidence that any defendant has been within the jurisdiction of the Court at some time not more than two years before the information was filed, and that such defendant is out of the jurisdiction, or that upon inquiry at his usual place of abode (if he had any), or at any other place or places where at the time when the information was filed he might probably have been met with, he could not be found, so as to be served with a copy of the information, and that in either case there is just ground to believe that such defendant has gone out of the jurisdiction, or otherwise absconded to avoid being served with such copy of the information or with other process, the Court or a Judge may order that such defendant do appear at a certain day, to be named in the order, and a copy of such order, together with a notice to the effect set forth at the end of this clause, may within fourteen days after such order made be inserted in the *London Gazette,* and be otherwise published as the Court or a Judge may direct; and where the defendant does not appear within the time limited by such order, or within such further time as the Court or a Judge may appoint, then, on proof made of such publication of the order, the Court or a Judge may

order an appearance to be entered for the defendant, on the application of the informant.

"NOTICE.—*A. B.* Take notice, that if you do not appear, pursuant to the above order, the informant may enter an appearance for you, and the Court may afterwards grant to the informant such relief as he may appear to be entitled to on his own shewing."

6. *Ib.* X. 7.—Where a person named as a defendant to an information is out of the jurisdiction of the Court:

(1.) The Court or a Judge, upon application supported by sufficient evidence in what place or country such defendant is or may probably be found, may order that a copy of the information, and, if an answer is required, a copy of the interrogatories may be served on such defendant in such place or country, or within such limits, as the Court or Judge shall think fit to direct.

(2.) Such order shall limit a time after such service, within which such defendant is to appear to the information, such time to depend on the place or country within which the copy of the information is to be served; and where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or demur, or obtain further time to make his defence to the information.

(3.) At the time when such copy of the information shall be served, the informant shall also cause such defendant to be served with a copy of the order giving the informant leave to serve such copy of the information.

(4.) And if upon the expiration of the time for appearing it be shewn to the satisfaction of the Court or a Judge that such defendant was duly served with such copy of the information, and with a copy of the order, the Court or Judge may, upon the application of the informant, order an appearance to be entered for such defendant.

7. *Ib.* X. 9.—A defendant, notwithstanding that an appearance may have been entered for him by the informant, may afterwards enter an appearance for himself in the ordinary way, but such ap-

pearance by such defendant shall not affect any proceeding duly taken, or any right acquired by the informant under or after the appearance entered by him, or prejudice the informant's right to be allowed the costs of the first appearance.

8. *Ib.* III. 5.—Every party defending in person shall cause to be written or printed upon every demurrer, plea, answer, or other pleading or proceeding, and upon all instructions which he may leave at the Queen's Remembrancer's office for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the Queen's Remembrancer's office) another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, and other documents, proceedings, and written communications, may be left for him.

Rule III.

Amendment of Informations.

1. *Ib.* IX. 18.—Where in amending an information no addition or insertion of more than 180 words in any one place is made, the information may be amended by written alterations in the printed information which has been filed, and by written additions on paper to be interleaved therewith, if necessary, but in all other cases the amendment must be made by a reprint of the information.

2. The practice of amending a defendant's copy of the information shall, with respect to informations filed after these rules come into operation, be abolished.

3. *Ib.* IX. 20.—A copy of an amended information, whether upon an amendment by a reprint, or by such alterations and additions as mentioned in the first clause of this rule, shall be served upon the defendant or his solicitor, and such copy may be partly printed and partly written, if the amendment is not made by a reprint: and in every case the copy to be served shall be first so marked by the proper officer of the Court as to indicate the filing of such amended information, and the date of the filing or amendment thereof.

4. *Ib.* IX. 21.—Where a defendant defends by a solicitor, ser-

vice upon such solicitor of a copy of the amended information, whether wholly printed or partly printed and partly written, shall be good service on such defendant.

5. *Ib.* IX. 22.—Where a defendant defends in person, service at the address for service of such defendant of a copy of the amended information, whether wholly printed or partly printed and partly written, shall be good service on such defendant.

Rule IV.

Interrogatories.

1. *Ib.* XI. 2.—Where the informant requires an answer to an information from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants shall be filed within eight days after the time limited for the appearance of such defendant or defendants.

2. *Ib.* XI. 3.—After the expiration of eight days from the time limited for the appearance of any defendant, no interrogatories shall be filed for the examination of such defendant without the special leave of the Court or of a Judge, granted upon hearing the parties.

3. *Ib.* XI. 4.—Where a defendant required to answer appears in person or by his solicitor within the time limited for that purpose by the rules of the Court, the informant shall, within eight days after the time allowed for such appearance, deliver to such defendant or to his solicitor a copy of the interrogatories so filed as aforesaid, or of such of them as the particular defendant is required to answer; and the copy so to be delivered shall be examined with the original by the Clerks of the Queen's Remembrancer, and they, on finding that the same is properly written, shall mark the same as an office copy.

4. *Ib.* XI. 5.—Where a defendant to a suit does not appear in person or by his own solicitor within the time allowed for that purpose by the rules of the Court, and the informant files interrogatories for his examination, the informant may deliver a copy of such interrogatories so examined and marked as aforesaid to such defendant, at any time after the time allowed to such defendant to appear, and before his appearance in person or by his own solicitor,

or the informant may deliver a copy of such interrogatories so examined and marked as aforesaid to the defendant or his solicitor after the appearance of such defendant in person or by his solicitor, but within eight days after such appearance.

Rule V.

Times allowed in Procedure.

1. *Ib.* XXXVII. 3.—A defendant may demur alone to an information within twelve days after his appearance thereto, but not afterwards.

2. *Ib.* XXXVII. 4.—A defendant required to answer an information, whether original or amended, must put in his plea, answer, or demurrer thereto, not demurring alone, within twenty-eight days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer, or within such further time as the Court or a Judge may allow.

If he does not he is subject to the following liabilities:

(1.) An attachment may be issued against him.

(2.) If the sheriff takes the defendant under the attachment, and accepts bail, and makes his return accordingly, the informant may, by motion of course, obtain an order directed to the Tipstaff of Her Majesty's Court of Exchequer, to bring the defendant to the bar of the Court, and upon the defendant's being brought to the bar of the Court, the Court may, if it think fit, absolutely commit him to Whitecross Street Prison until he has put in his answer.

(3.) If the sheriff, under the attachment, arrests the defendant, and sends him to prison, or, finding him already in custody, detains him, and makes his return accordingly, the informant may, by motion of course, obtain a writ of *habeas corpus* to bring the defendant to the bar of the Court, and upon the defendant's being so brought to the bar of the Court, the Court may, if it think fit, absolutely commit him to Whitecross Street Prison, until he has put in his answer.

(4.) The informant may file a traversing note, or proceed to have the information taken *pro confesso* against the defendant.

3. *Ib.* XXXVII.—A defendant who is served with a copy of an information, whether original or amended, and is not required to answer the same, may, without any leave of the Court or a Judge, put in a plea, answer, or demurrer, not demurring alone, within fourteen days after the expiration of the time within which he might, if required to answer, and appearing within the time limited for his appearance, have been served with interrogatories for his examination in answer to the information.

4. *Ib.* XXXVII. 6.—Where a defendant is ordered to answer amendments and exceptions together, he must put in his further answer and his answer to the amendments within fourteen days after he shall have been served with interrogatories for his examination in answer to the amended information, or within such further time as the Court or Judge may allow. If he does not he is subject to the same liabilities as are mentioned in the second clause of this rule.

5. The answer of a defendant shall be deemed sufficient:

(1.) Where no exceptions for insufficiency are filed thereto within six weeks after the filing of such answer.

(2.) Where exceptions being filed the informant does not set them down to be argued in the term next following the filing of such exceptions.

(3.) Where a further answer is filed, and the whole exceptions are not set down to be argued in the term next following the filing of such further answer.

6. *Ib.* XXXIII. 2.—Unless the Court or a Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and a day named in the notice for hearing the motion. And in the computation of such two clear days, Sundays and other days in which the Queen's Remembrancer's Office is closed, shall not be reckoned.

7. The times limited in this and the others of these rules shall apply both to town and country causes, and in all cases not provided for by these rules the times in all causes shall be the same as those heretofore allowed in town causes.

Rule VI.

Printing of Answers.

1. *Chancery Order of 6th March*, 1860.—The practice of engrossing answers on parchment shall henceforth be discontinued, and a defendant (except as otherwise provided by the fifth clause of this rule) is to file his answer divided into paragraphs, numbered consecutively, and written bookwise upon paper of the same size and description as that on which informations are printed.

2. At the time when defendant files his answer he is to leave with the Queen's Remembrancer a fair copy thereof (without the schedules, if any, of accounts or documents), and the Clerks of the Queen's Remembrancer are to examine and correct such copy with the answer filed, and return it so examined, with a certificate thereon that it is correct and proper to be printed.

3. A defendant is then to cause his answer to be printed from such certified copy on paper of the same size and description, and in the same type, style, and manner, on and in which informations are required to be printed, and before the expiration of four days from the filing of his answer is to leave a printed copy thereof with the Queen's Remembrancer, with a written certificate thereon by the defendant's solicitor, or by the defendant if defending in person, that such print is a true copy of the copy of the answer so certified, and if such printed copy shall not be so left, the defendant shall be subject to the same liabilities as if no answer had been filed.

4. At any time after the expiration of such four days, the defendant, within forty-eight hours after the same shall have been demanded in writing, is to have ready for delivery to the informant an official and certified printed copy of the answer.

5. Notwithstanding the preceding clauses of this rule, a defendant is to be at liberty to swear to and file a printed answer.

6. On receiving from the informant a demand for an official and certified printed copy of the answer, the defendant is to get a printed copy thereof examined by the Clerks of the Queen's Remembrancer with the answer as filed, and to stamp such copy with a stamp for 5*s.*; and the Clerks of the Queen's Remem-

brancer, on finding that such copy is duly stamped and correct, are to certify thereon that the same is a correct copy, and to mark the same as an office copy.

7. Such copy is, on demand, to be delivered to the informant, who, on receipt thereof, is to pay to the defendant the amount of the stamp thereon, and at the rate of 4*d.* per folio for the same.

8. The informant is also to be entitled to demand and receive from the defendant any additional number of printed copies of his answer not exceeding ten, on payment for the same at the rate of one halfpenny per folio.

9. After all the defendants who are required to answer shall have filed their answers, a co-defendant is to be entitled to demand and receive from any other defendant any number of printed copies of his answer, not exceeding six, on payment for the same at the rate of one halfpenny per folio.

10. Office copies of schedules to answers of accounts or documents are to be obtained according to the practice now existing for obtaining office copies of answers.

11. The Clerks of the Queen's Remembrancer are not to certify or mark any printed copy of an answer which has any alteration or interlineation in writing.

12. No costs are to be allowed for any written brief of an answer, unless the Court or a Judge shall direct the allowance thereof.

13. The clauses of this rule, other than Clause 1, are not to apply to answers filed by defendants defending in *formâ pauperis.*

Rule VII.

Taking Informations pro Confesso.

1. *Consolidated Chancery Orders,* XXII.—Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the informant may cause such defendant to be served with a notice of motion to be made on some day in the following term, not less than fourteen days after the day of such service, that the information may be taken *pro confesso* against such defendant, and thereupon, unless such defendant has in the meantime put in his answer to the infor-

mation, or obtained further time to answer the same, the Court, if it so think fit, may order the information to be taken *pro confesso* against such defendant, either immediately, or at such time, and upon such terms, and subject to such conditions, as under the circumstances of the case the Court shall think proper.

2. Where any defendant, whether within or not within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the informant is unable with due diligence to procure a writ of attachment, or any subsequent process for want of answer to be executed against such defendant by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant shall, for the purpose of enabling the informant to obtain an order to take the information *pro confesso*, be deemed to have absconded to avoid or to have refused to obey the process of the Court.

3. Where any defendant who, under the second clause of this rule, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, appears in person or by his own solicitor, the informant may serve upon such defendant or his solicitor a notice that on a day in such notice named (being not less than fourteen days after the service of such notice) the Court will be moved that the information may be taken *pro confesso* against such defendant: and the informant must, upon the hearing of such motion, satisfy the Court that such defendant ought, under the provisions of the second clause of this rule, to be deemed to have absconded to avoid or to have refused to obey the process of the Court; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice as under the circumstances of the case the Court may think proper.

4. Where any defendant who, under the second clause of this rule, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, has had an appearance entered for him under the second, fifth, or sixth clause of Rule II., and does not afterwards appear in person or by his own solicitor, the informant may cause to be inserted in the *London Gazette* a notice that on a day in such notice named (being not less than four weeks

after the first insertion of such notice in the *London Gazette*) the Court will be moved that the information may be taken *pro confesso* against such defendant, and the informant must upon the hearing of such motion satisfy the Court that such defendant ought, under the provisions of the second clause of this rule, to be deemed to have absconded to avoid or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the *London Gazette* at least once in every entire week (reckoned from Sunday morning to Saturday evening) which shall have elapsed between the time of the first insertion thereof and the time for which the said notice is given; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice, as under the circumstances of the case the Court may think proper.

5. Any defendant being in custody for want of his answer and submitting to have the information taken *pro confesso* against him, may apply to the Court upon motion, with notice to be served on the informant, to be discharged out of custody, and thereupon the Court may order the information to be taken *pro confesso* against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears, from the nature of the informant's case, or otherwise to the satisfaction of the Court, that justice cannot be done to the informant without discovery or further discovery from such defendant.

6. No cause in which an order is made that an information be taken *pro confesso* against a defendant, shall be heard on the same day on which the order is made, but the cause shall be set down to be heard, and the Court, if it so think fit, may appoint a special day for the hearing thereof.

7. A defendant against whom an order to take an information *pro confesso* is made may appear at the hearing of the cause, and where he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the information.

8. Upon the hearing of a cause in which an information has been ordered to be taken *pro confesso*, such decree shall be made

as to the Court shall seem just; and in the case of any defendant who has appeared at the hearing, and waived all objection to such order to take the information *pro confesso*, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on him, or after the execution of a writ of attachment against him, the decree shall be absolute.

9. In pronouncing the decree the Court may, either upon the case stated in the information, or upon that case and a motion by the informant for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the information has been ordered to be taken *pro confesso* to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appear to be just) direct payment to be made out of such real or personal estate of such sum of money as at the hearing or any subsequent stage of the cause the informant shall appear to be entitled to.

10. A decree founded on an information taken *pro confesso* is to be entered as other decrees.

11. After a decree founded on an information taken *pro confesso* has been entered, an office copy thereof shall (unless the Court shall dispense with service thereof) be served on the defendant against whom the order to take the information *pro confesso* was made, or his solicitor; and where the decree is not absolute, under the eighth clause of this rule, such defendant or his solicitor shall be at the same time served with a notice to the effect that if such defendant desires permission to answer the informant's information, and set aside the decree, application for that purpose must be made to the Court within the time specified in the notice, or that otherwise such defendant will be absolutely excluded from making any such application.

12. Where such notice as is mentioned in the last preceding clause of this rule is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant shall be fourteen clear days after the service of such notice, or in case the Court be not sitting at the expiration of such fourteen clear days, then on the first day of the term next following the expiration of such fourteen clear days; but where such notice is to be served out of the jurisdiction of the Court such

time shall be specially appointed by the Court, on the *ex parte* application of the informant.

13. No proceeding shall be taken, and no receiver appointed under the decree, nor any sequestrator under any sequestration issued in pursuance thereof, shall take possession of or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process shall issue to compel performance of the decree, without leave of the Court or a Judge, to be obtained after notice served on such defendant or his solicitor, unless the Court or a Judge shall dispense with such service.

14. Any defendant waiving all objection to take the information *pro confesso*, and submitting to pay such costs as the Court may direct, may before enrolment of the decree have the cause re-heard upon the merits stated in the information, the petition for re-hearing being signed by counsel as other petitions for re-hearing.

15. Where a decree is not absolute, under the eighth clause of this rule, the Court may order the same to be made absolute, on the motion of the informant made:

(1.) After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.

(2.) After the expiration of the time limited by the notice provided for by the eleventh clause of this rule, where the decree has been served without the jurisdiction.

(3.) After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof.

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may, on the hearing of such motion, allow to the defendant for moving for leave to answer the information.

16. Where the decree is not absolute, under the eighth clause, and has not been made absolute under the fifteenth clause of this rule, and the defendant has a case upon merits not appearing in the information, he may apply to the Court by motion supported by an affidavit stating such case, and submitting to such terms with respect to costs and otherwise as the Court may think reason-

able for leave to answer the information; and the Court, if satisfied that such case is proper to be submitted to the judgment of the Court, may, if it think fit and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the information; and where permission is so given to put in an answer, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made and no proceedings against such defendant had been had in the cause.

17. The rights and liabilities of any defendant under a decree made upon an information taken *pro confesso* shall extend to the representatives of any deceased defendant, and to any persons claiming under any person who was defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion served in such manner and supported by such evidence as under the circumstances of the case the Court may deem sufficient, permit such proceedings to be taken as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the right of the parties duly ascertained and determined.

Rule VIII.

Traversing Note.

1. *Consolidated Chancery Orders*, XIII. 1.—After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to any information, whether original or amended before answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the informant may, if he think fit, file a note at the Queen's Remembrancer's office to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed an answer traversing the case made by the information."

2. *Ib.* 2.—After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an

information amended after answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the informant may, if he think fit, file at the Queen's Remembrancer's Office a note to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed an answer traversing the allegations introluced into the information by amendment."

3. *Ib.* 3.—After the expiration of the time allowed to a defendant to put in his further answer to any information, if such defendant shall not have put in any further answer, the informant may, if he think fit, file at the Queen's Remembrancer's office a note to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed a further answer traversing the allegations in the information whereon the exceptions are founded."

4. *Ib.* 4.—Where a demurrer or plea to the whole information is overruled, the informant, if he does not require an answer, may, if he think fit, immediately file his note in manner directed by the first or second clause of this rule, as the case may require, and with the same effect, unless the Court, upon overruling such demurrer or plea, gives time to the defendant to plead, answer, or demur, and in such case, if the defendant does not file any plea, answer, or demurrer, within the time so allowed by the Court, the informant, if he does not then require an answer, may, if he think fit, on the expiration of such time, file such note.

5. *Ib.* 5.—A traversing note having been filed, a copy thereof shall be served on the defendant against whom the same was filed.

6. *Ib.* 6.—The filing of a traversing note, and due service of a copy thereof, shall have the same effect as if the defendant against whom such note is filed had filed a full answer, or further answer, traversing the whole information, or those parts of it to which the note relates, on the day on which the note was filed.

7. A defendant, after service of the copy of the traversing note filed against him as aforesaid, shall not plead, answer, or demur to the information, or put in any further answer thereto, without the special leave of the Court or a Judge, and the cause shall stand in the same situation as if such defendant had filed a full answer or further answer to the information on the day on which the note was filed.

Rule IX.

Replication and Joining Issue.

1. *Ib.* XVII. 2.—No subpœna to rejoin shall hereafter be issued, and only one replication shall be filed in each cause unless the Court or a Judge shall otherwise direct, and the replication shall be in the form set forth at the end of this rule, or as near thereto as circumstances admit, and upon the filing of such replication the cause shall be deemed to be completely at issue, and each defendant may, without any rule or order, proceed to verify his case by evidence, and the informant may in like manner proceed to verify his case by evidence, as soon as notice of the replication having been filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the information.

Form of Replication.

Between informant and defendant.

The informant hereby joins issue with the defendants [*all the defendants who have answered or pleaded, or against whom a traversing note has been filed, or who have not been required to answer, and have not answered the information*], and will hear the cause on information and answer against the defendants [*all the defendants against whom the cause is to be heard on information and answer*], and on the order to take the information *pro confesso* against the defendants [*all the defendants against whom the information is to be taken pro confesso.*]

Rule X.

Evidence.

1. *Consolidated Chancery Orders, Sect. VIII.* 15 & 16 *Vict. c.* 26, *s.* 28.—The mode of examining witnesses now in force, and all the practice of the Court in relation thereto, so far as the same are inconsistent with these rules, shall, from and after the time appointed for these rules to come into operation, be abolished: pro-

vided always, that the Court or a Judge may, if it shall seem fit, order any particular witness or witnesses within the jurisdiction of the Court, or any witness or witnesses out of the jurisdiction of the Court, to be examined upon interrogatories in the mode now in force, or in such other mode as the Court or a Judge may direct; and that with respect to such witness or witnesses the practice of the Court in relation to the examination of witnesses shall continue in force, save only so far as the same may be varied by any order of the Court or a Judge in reference to any particular case.

2. *Chancery Order, 5th February*, 1861, *Rule* 3.—The informant or any defendant may, at any time within fourteen days after issue has been joined in a cause, apply to a Judge by a summons to be served on the opposite party for an order that the evidence as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken *vivâ voce* at the hearing of the cause, and the Judge may, if he shall so think fit, make an order that the evidence as to such facts and issues, or any of them, shall be taken *vivâ voce* at the hearing accordingly; and the facts and issues as to which any such orders shall direct that the evidence shall be taken *vivâ voce* at the hearing shall be distinctly and concisely specified in such order. And where any such order shall have been made, the examination in chief, as well as the cross-examination and re-examination, shall be taken before the Court at the hearing as to the facts and issues specified in such order; and no affidavit shall be admissible at the hearing in respect of any fact or issue which shall be included in any such order as aforesaid.

3. Except as to facts or issues included in any order directing evidence to be taken *vivâ voce* at the hearing under the first clause of this rule, each party shall be at liberty to verify his case by affidavit.

4. A Judge may, if he think fit, upon the application of either party, by summons served on the opposite party, order that any particular witness or witnesses shall be examined orally before an examiner specially appointed by the Judge for that purpose, whether the evidence of such witness or witnesses relate to any facts and issues specified in an order under the second clause of this rule or not; and witnesses so examined shall be subject to

cross-examination and re-examination; and such examination, cross-examination, and re-examination shall be conducted as nearly as may be in the mode now in use in Courts of Common Law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause, but subject to such directions as may be given by the Judge in any particular case.

5. *Chancery Order, 5th February,* 1861, *Rule* 5; *Exchequer Rules,* 1860, 119.—The evidence in chief on both sides in any cause taken before the hearing, to be used at the hearing (including the examination, cross-examination, and re-examination of any witness before a special examiner, under any such order as mentioned in the last preceding clause of this rule), shall be closed within eight weeks after issue joined, unless the time is enlarged by special order; and no evidence subsequently taken shall be admissible without special leave of the Court or a Judge.

6. *Consolidated Chancery Orders,* XVIII. 1; *and Exchequer Rules,* 1860, 121.—All affidavits made in a cause, whether for the purpose of being used at the hearing or otherwise, shall be taken and expressed in the first person of the deponent, and all affidavits shall be filed in the Queen's Remembrancer's office; and affidavits to be used at the hearing of a cause shall be so filed before the time of closing evidence.

7. 15 & 16 *Vict. c.* 86, *s.* 37.—Every affidavit in a cause shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject.

8. *Consolidated Chancery Orders,* XIX. 12.—No affidavit filed before issue joined in any cause shall, without special leave of the Court or a Judge, be received at the hearing thereof, unless within one month after issue joined notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

9. *Chancery Orders, 5th February,* 1861, *Rule* 19.—Where any party has filed an affidavit intended to be used at the hearing of a cause, any opposite party desiring to cross-examine the witness who has made such affidavit may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the witness for cross-examination before the Court

at the hearing, such notice to be served within fourteen days next after closing the evidence: but a Judge, on the application of the party filing such affidavit, by summons served on the opposite party, may, if the circumstances of the case in his opinion render it expedient, make an order giving the party filing such affidavit liberty to produce such witness for cross-examination at a time named in such order, before an examiner specially appointed by the Judge, instead of at the hearing. Unless such witness is produced accordingly at the hearing, or, if such order as last aforesaid has been made, then at the time named in such order, such affidavit shall not be used as evidence without the leave of the Court. The party producing such witness shall be entitled to demand the expenses thereof in the first instance from the party requiring such production, but such expenses shall ultimately be borne as the Court shall direct. The witness, when produced and cross-examined, shall be subject to oral re-examination on behalf of the party by whom his affidavit was filed.

10. *Chancery Orders, 5th February,* 1861, *Rule* 20.—Where any such notice as is mentioned in the last preceding clause is given, the party to whom it is given shall be entitled to compel the attendance of the witness for cross-examination, in the same way as he might compel the attendance of a witness to be examined on his behalf.

11. The attendance of a witness, whether before the Court or a special examiner, may be compelled, either by an order of a Judge, in the same manner as in Courts of Common Law, or by a *subpœna ad testificandum,* or *subpœna duces tecum,* which may be in the form mentioned at the foot of this rule, with such variations as circumstances may require.

12. 15 & 16 *Vict. c.* 86, *s.* 34.—When the examination or cross-examination of witnesses before a special examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Queen's Remembrancer's office, to be there filed.

13. *Chancery Order, 5th February,* 1861, *Rule* 22.—Any party to a cause requiring the attendance of any person before the Court for the purpose of being examined, shall give to the opposite party forty-eight hours' notice at least of his intention to examine such

witness or person, such notice to contain the name and description of the person, unless the Court or a Judge shall in any case think fit to dispense with such notice.

14. 15 & 16 *Vict. c.* 86, *s.* 29.—Upon the hearing of any cause, the Court, if it shall see fit to do so, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid in such manner as it may think fit.

15. *Ib.* 41.—In cases where it shall be necessary for any party to go into evidence subsequently to the hearing of a cause, such evidence may be taken by affidavit, but subject to any special directions which may be given by the Court or a Judge in any particular case.

16. *Chancery Order, 6th March*, 1860.—Affidavits to be filed in the office of the Queen's Remembrancer, whether for the purpose of being used on an interlocutory application, or at the hearing of a cause, or otherwise, are to be written on foolscap paper bookwise: provided nevertheless, that the Queen's Remembrancer may receive and file affidavits written otherwise than as here directed, if, in his opinion, the circumstances of the case render such reception and filing desirable or necessary.

17. 15 & 16 *Vict. c.* 86, *s.* 59.—Upon applications by motion to the Court in any suit depending therein for an injunction, or to dissolve an injunction, the answer of the defendant shall, for the purpose of evidence on such motions, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto.

Form of Subpœna referred to in Clause 11 *of the preceding Rule.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To
greeting. We command you [and every of you], That all excuses ceasing, you do personally be and appear before [Our trusty and well-beloved the Barons of our Court of Exchequer at Westminster, at such times as the bearer hereof shall by notice in writing appoint,] [*or* an examiner specially appointed for the examination of witnesses in our Exchequer, at such times and

places as the bearer hereof shall by notice in writing appoint], to testify the truth according to your knowledge in a certain cause depending in our said Court of Exchequer, wherein is informant [and plaintiff, *or* and and others are plaintiffs], and . [and others *or* another] is [*or* are] defendant [*or* defendants] on the part of the [and that you then and there bring with you and produce], and hereof fail not at your peril.

Witness, &c.

Rule XI.

Setting down for Hearing.

1. *Consolidated Chancery Orders*, XXI. 1.—Within eight weeks after the evidence has been closed, the informant is to set down the cause, and obtain and serve on the solicitor of the defendant, or upon the defendant if defending in person, a subpœna to hear judgment. If he does not, any defendant, after the expiration of such eight weeks, may set the cause down, and may obtain a subpœna to hear judgment, and serve the same on the solicitor of the informant, and on the other defendants, if any.

2. *Ib.* 5.—A subpœna to hear judgment must be served at least ten days before the return thereof.

3. A subpœna to hear judgment shall be in the form next hereinafter set forth, with such variations as circumstances may require.

Subpœna to hear Judgment.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith : To greeting. We command you [and every of you] that you appear before the Chancellor and Barons of our Exchequer at Westminster, on the day of or whenever thereafter a certain cause now depending in our Court of Exchequer at Westminster, wherein is informant [and plaintiff], and is defendant [*or*, are defendants], shall come on for hearing, then and there to receive and abide by such judgment and decree as

shall then or thereafter be pronounced, upon pain of judgment being pronounced against you by default.

Witness at Westminster, the day of , in the year of our Lord One thousand eight hundred and sixty .

Rule XII.

Decrees, Rules, and Orders.

1. *Ib.* XXIII. 2.—It shall not be necessary in drawing up any decree to recite any of the pleadings or any previous proceeding beyond the prayer of the information, but it shall be sufficient to refer thereto; save only that in cases involving special circumstances as the Court or a Judge shall direct, or the Queen's Remembrancer shall in his discretion think fit, such short recitals may be inserted as may be necessary to shew the grounds on which the decree is granted.

2. *Rules of 26th November,* 1861.—All rules at side bar, and orders on motion of course, shall bear date on the day they are drawn up.

3. *Rule of 22nd June,* 1860.—All rules upon the sheriffs of London or Middlesex to return writs shall be four-day rules, and upon other sheriffs eight-day rules.

4. *Rule* 114.—The writ heretofore used calling upon a party to perform a rule, order, or decree, shall not be necessary or used to bring such party into contempt, but the serving of a copy of the rule, order, or decree, or the copy of an office copy of such rule, order or decree, shall be deemed sufficient service.

5. *Rule* 113.—It shall not, except in cases of attachment, be necessary to the regular service of a rule, order, or decree, that the original or office copy thereof should be shewn, unless sight thereof be demanded.

Rule XIII.

Revivor and Supplement.

1. Where an order under "The Crown Suits, &c., Act, 1865," to the effect of an order to revive or of a supplemental decree, has

been obtained, the first seven clauses of the second of these rules shall be applicable in the same manner as if such order were an information filed on the day on which such order is obtained, and to which the persons who would be defendants to an information of revivor or supplemental information were defendants.

2. *Consolidated Chancery Orders,* XXXII. 1.—Any person under no disability, or under the disability of coverture only, who may be served with any such order as mentioned in the last preceding clause, may apply to the Court or a Judge to discharge such order within twelve days after such service.

3. *Ib.*—Any person under any disability other than coverture who may be served with any such order as last aforesaid, may apply to the Court or a Judge to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such person, and until such period of twelve days shall have expired such order shall be of no effect as against such person.

4. *Ib.* 2.—Where the informant in any cause which is not in such a state as to allow of an amendment being made in the information, desires to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue, by filing in the Queen's Remembrancer's office a statement, either written or printed, to be annexed to the information, and such proceedings by way of answer, evidence, and otherwise, shall be had and taken upon the statement so filed as if the same were embodied in a supplemental information.

Rule XIV.

Written Pleadings, &c.

Chancery Order, 6th March, 1860.—Pleas, demurrers, interrogatories, traversing notes, replications, supplemental statements, exceptions, and certificates, to be filed in the office of the Queen's Remembrancer, are to be written on paper of the same description and size as that on which informations are printed.

Rule XV.

Computations of Time.

1. *Revenue Side Rule* 61.—In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

2. *Rule* 62.—Christmas Day, and the three following days, and the days between the Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in the time allowed for any proceeding.

3. The period from the 10th day of August to the 24th day of October (both inclusive) shall be excluded in reckoning the time allowed for pleading, answering, or demurring to an information, and for filing exceptions to answers.

Rule XVI.

Payment of Money into Court.

1. *Exchequer Rules of* 1860, 132, 133, 134.—Any party directed by any decree or order of the Court or a Judge to pay money into Court, must apply at the office of the Queen's Remembrancer for a "direction" so to do, which direction must be taken to the Bank of England, and the money there paid in. After payment, the receipt obtained from the Bank of England must be filed at the Queen's Remembrancer's office.

2. If the money is to be invested, paid out, or otherwise disposed of, an order of the Court or a Judge must be obtained for that purpose, upon notice to the opposite party.

3. The orders relating to the matters mentioned in this rule are to be drawn up in the Queen's Remembrancer's office.

Rule XVII.

Recognizances.

1. *Exchequer Rules of* 1860, 68, 71, 72.—All recognizances, if taken and acknowledged in town, are to be taken and acknowledged before a Judge; and if a recognizance be taken and acknowledged in the country, the same may be taken and acknowledged before a Commissioner for taking special bail in the Exchequer, and in the latter case an affidavit of caption must be made and filed.

2. No enrolment of any recognizances shall be necessary, but the same shall be filed in the Queen's Remembrancer's office.

3. All recognizances are to be prepared on parchment by the respective parties entering into the same.

Rule XVIII.

Issuing Writs.

1. *Rules of Revenue Side,* 1860.—All writs in suits shall be prepared by the solicitor of the department, or by the solicitor suing out the same, and the name of the solicitor of the department, together with the name of the department, or the name and address of such other solicitor, shall be endorsed on such writ; and every such writ shall before the issuing thereof be sealed at the Queen's Remembrancer's office, and a præcipe thereof left at the said office; and thereupon an entry of every such writ, together with the date of sealing and the name of the solicitor suing out the same, shall be made in a book to be kept at the Queen's Remembrancer's office for that purpose; and all such writs shall be tested of the day, month, and year when issued, and conclude without any other words.

Rule XIX.

Distringas.

A writ of *distringas* on behalf of Her Majesty's Attorney General, or of the Attorney General of the Prince of Wales and Duke of

Cornwall, to restrain the transfer of stock transferable at the Bank of England, or the payments of the dividends thereon, shall continue to be issuable from the office of the Queen's Remembrancer in the form heretofore made, but concluding with the date of the day, month, and year of issue only.

Rule XX.

Power of Court as to Time.

1. Any power which the Court or a Judge may now possess to enlarge or abridge the time for doing any act or taking any proceeding, upon such (if any) terms as the justice of the case may require, shall not be affected by these orders.

Rule XXI.

Costs.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the schedule hereto, unless the Court shall make order to the contrary as to all or any of the parties.

2. *Exchequer Rules of* 1860, 81, 82, 86.—Where costs are to be taxed, one day's notice of taxing costs, together with a copy of the bill of costs, shall be given to the solicitor of the party whose costs are to be taxed, by the other party or his solicitor.

3. Where costs are directed to be paid to the Crown, a certificate shall be granted by the Queen's Remembrancer of the costs allowed, and on default of payment the solicitor of the department may sue out a subpœna for the payment of such costs, and on an affidavit of service thereof, and demand made, and nonpayment, an attachment may be granted.

4. A subpœna for costs shall be in the form set forth at the foot of this rule, with such variations as circumstances may require.

Subpœna for Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To
greeting. We command you [and every of you], That you pay or cause to be paid immediately after the service of this writ to

or the bearer of these presents, £ costs in a cause wherein is informant [and plaintiff] and [and another, *or* others] is defendant [*or*, are defendants], by our Court of Exchequer adjudged to be paid by you the said under pain of an attachment issuing against your person, and such process for contempt as the said Court shall award in default of such payment.

Witness, &c.

Rule XXII.

Appointments.

22*nd June*, 1860, *Rule* 139.—On every appointment made by the Queen's Remembrancer, the party on whom the same shall be served shall attend without waiting for a second appointment, or in default thereof the Queen's Remembrancer may proceed *ex parte* on the first appointment.

Rule XXIII.

Commencement of Rules.

1. These rules shall take effect and come into operation on the 16th day of April, 1866, but nothing therein contained shall apply to any suit commenced by information filed before that day, unless the Court or a Judge shall on hearing the parties so direct.

RULE XXIV.

Interpretation.

1. In the preceding rules the following words (that is to say), "the Court," "information," "suit," and "cause," have the meanings mentioned in "The Crown Suits, &c., Act, 1865," sect. 6; and the term "a Judge" means any Judge of one of Her Majesty's Superior Courts of Law at Westminster transacting business out of Court.

2. In the preceding rules the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction (that is to say):

(1.) Words importing the singular number include the plural

number, and words importing the plural number include the singular number.

(2.) Words importing the masculine gender include females.

(3.) The word "party" or "parties" includes a body politic or corporate, and also includes Her Majesty's Attorney General, or the Attorney General of the Prince of Wales and Duke of Cornwall, as the case may require.

(4.) The word "affidavit" includes affirmation.

FRED. POLLOCK.
G. BRAMWELL.
SAMUEL MARTIN.
W. F. CHANNELL.
March 14, 1866. G. PIGOTT.

SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

Instructions.	£	*s.*	*d.*
For special cases, answers, examinations, demurrers, pleas, and exceptions	0	13	4
For informations	2	2	0
For amended or supplemental information	0	13	4
For brief for moving for injunction	1	1	0
For interrogatories for examination of parties or witnesses	0	13	4
For special petitions	0	13	4
For special affidavits	0	6	8
For brief in suit by information on cause coming on for hearing on service of subpœna to hear judgment	1	1	0
To defend proceedings commenced by information	0	13	4
For instructions for order to revive or add parties	0	13	4

As to informations and answers, affidavits and petitions, in lieu of the fixed fees for instructions for and for drawing, the Queen's Remembrancer is to be at liberty to take into his consideration the special circumstances of each case, and at his discretion to make such further allowance as shall appear to him to be just.

The Preparation of Pleadings and other Documents.

(The folio to be seventy-two words, and the sheet ten folios.)

For drawing informations, answers, pleas, demurrers, exceptions, interrogatories, and affidavits, per folio	0	1	0
For engrossing, per folio	0	0	4
For drawing statements and other documents for the Judges's chambers or Queen's Remembrancer, when required, including the fair copy thereof to leave in chambers, per folio	0	1	0

	£	s.	d.
For examining and correcting the proof of an information or answer, per folio	0	0	2
For revising the print of an answer before swearing or filing, per folio	0	0	2
For drawing special notice of motion	0	5	0
Or, per folio	0	1	0
For drawing such observations for counsel to accompany brief as may be necessary and proper, per sheet	0	6	8
For drawing the brief on further consideration, per sheet	0	6	8
For preparing and filing replication	0	10	0
For drawing statement on which counsel to move for order to revive or add parties, and copy	0	10	0
Or, according to circumstances, at per sheet	0	6	8
For drawing petition to revive, at per folio	0	1	0
For drawing and copying certificate to appoint guardians *ad litem*	0	6	8
For amending each copy of an information to serve where no reprint	0	13	4
For amending each brief information where no reprint	0	13	4
For drawing bills of costs, including the copy for the Queen's Remembrancer's office, per folio	0	0	8

The fee for drawing a document in all cases includes a copy, if required, for the use of the solicitor or client, or for the settlement of counsel.

Perusals.

For perusing the print of an information by the defendant's solicitors	1	1	0
If exceeding sixty folios, at per folio	0	0	4
For perusing the print of an amended information	0	13	4
If amendments exceeding forty folios, at per folio	0	0	4
For perusing an amended information when amended in writing	0	6	8
If amendments exceeding twenty folios, at per folio	0	0	4
The solicitor of the party answering interrogatories, for perusing interrogatories	0	13	4
If exceeding forty folios, at per folio	0	0	4
For perusing an answer	0	13	4
If exceeding forty folios, at per folio	0	0	4
For perusing an examination, at per folio	0	0	4
For perusing all special affidavits filed by an opposing party, at per folio	0	0	4
For perusing copy supplemental statement under Crown Suits Act	0	13	4
For perusing copy order to revive	0	13	4

Copies.

Subject to the foregoing regulations as to charges for copies, copies of all documents are to be at the rate of per folio	0	0	4
Or per sheet of ten folios at	0	3	4

Having regard to the preceding fees for perusal, the fee for abbreviating is to cease, and no close copies are now to be allowed as of course, but the allowance is to depend on the propriety of making the copy, which in each case is to be shewn and considered.

For each copy of a summons to serve	0	2	0
For each copy of a notice of motion, order, or certificate to serve	0	1	0
Or at per folio	0	0	4

Attendances.

For attending on the Queen's Remembrancer's warrant	0	6	8
Or according to the circumstances, not to exceed per diem	2	2	0

	£	s.	d.
For attending each counsel with his brief, case, or abstract, in a suit or other proceeding in this Court	0	6	8
For the like, where the fee amounts to five guineas	0	13	4
Where it amounts to twenty guineas	1	1	0
Where it amounts to forty guineas or upwards	2	2	0
For attending to present special petition, and for same answered	0	6	8
For attending on Counsel and Court on motion of course, and for order	0	13	4
For attending on the day in which a cause or petition stands appointed for hearing, or for which notice of motion has been given	0	10	0
For attending when heard	1	1	0
Or according to circumstances, not to exceed per diem	2	2	0
For attending the Court on every special motion, when made	0	13	4
Or according to circumstances, not to exceed	1	1	0
For attending on motion for or to discharge order for injunction or other matter when heard, per diem	0	13	4
Or according to circumstances, not to exceed	1	1	0
For attending to get answer or special affidavit sworn	0	6	8
For attending examiner to procure appointment to examine witnesses	0	6	8
For attending the examination of witnesses before examiner	0	13	4
Or according to circumstances, not to exceed per diem	2	2	0
But if without counsel the fee may, at the Queen's Remembrancer's discretion, be increased to	3	3	0
For attending to settle and afterwards to read over the engrossment of an answer or examination	0	13	4
If the same exceed twenty folios and under fifty folios	1	1	0
And for each additional thirty folios	0	6	8
For attending to insert an advertisement in *Gazette*	0	6	8
For entering caveat with the Queen's Remembrancer	0	6	8
For attending to procure certificate of a caveat	0	6	8
For attending Queen's Remembrancer to certify abatement or settlement of suit, and to have same so marked in the cause book	0	6	8
For attending the printer with an information or answer to be printed	0	6	8
For attending to get copies of information or interrogatories marked for service	0	6	8
For attending to take instructions to appear, and to enter the appearance of one or more defendants, not exceeding three	0	6	8
If exceeding three, for every additional number not exceeding three	0	6	8
The solicitor of the party filing an answer, for his attendance on the Queen's Remembrancer with and for the written and printed copies of an answer, and for certifying	0	13	4
For the informant, or party having the conduct of the order, attending the Queen's Remembrancer with briefs and papers, to bespeak minutes or order, not being an order of course	0	6	8
For ditto, for preparing list of evidence read, but only when required by the Queen's Remembrancer and certified by him	0	6	8
Or according to length, at per folio	0	1	0
Attending to settle the draft of any decree or order	0	13	4
Or, at the Queen's Remembrancer's discretion, not to exceed	2	2	0
In case the Queen's Remembrancer shall certify that a special allowance ought to be made in respect of any unusual difficulty in settling an order, he is to consider the same, and make such allowance to all or any of the parties as to him shall seem just.			
For attending to procure certificate of pleadings	0	6	8
For attending to give consent to take answer without oath, and for other necessary or proper consent, of a like nature	0	6	8
For attending to procure such consents	0	6	8
For attendances in consultation or in conference with counsel	0	13	4
For attending Court on appointment of a guardian *ad litem*	0	13	4

Writs.

	£	s.	d.
For every writ of *subpœna duces tecum*	0	6	8
For a writ or writs of subpœna other than *subpœna duces tecum*, if the number of names therein shall not exceed three	0	6	8
If exceeding three names, for every additional number not exceeding three	0	6	8
For preparing every other writing without order	0	6	8
For every writ under order, except special injunction	0	13	4
For special injunction, including engrossment	1	0	0
Or per folio	0	1	4

Notices and Services.

For service of a notice of motion, exclusive of copy	0	2	6
For notice to a solicitor of appearance, answer, demurrer, plea, amendment, and replication	0	2	6
For notice of filing affidavits or set of affidavits filed, or which ought properly to have been filed together, to be read in Court	0	2	6
For notice of appointment or copy warrant for settling and passing decrees or orders before the Queen's Remembrancer			
For copy and service of a warrant on a solicitor	0	2	6
For service of a judge's summons, exclusive of the copy	0	2	6
For service of a petition	0	2	6
For judge's summons, copy and service	0	5	0
For service of an order, exclusive of the copy	0	2	6
For other necessary or proper notice	0	2	6
For services on a party or witness, such reasonable charges and expenses as may be properly incurred, according to distance, or by the employment of an agent.			

Oaths and Exhibits.

To the commissioner for oaths in London according to statute	0	1	6
In the country	0	2	6
To the solicitor, for preparing each exhibit in town and country	0	1	0
The commissioner, for making each exhibit	0	1	0

Term Fee.

For a fee term, in all causes, for every term in which a proceeding by the party shall take place	0	10	0
And for letters, per term	0	5	0
In country agency causes the further fee for letters of	0	6	8

Where no proceeding is taken which carries a term fee, a charge for letters may be allowed, if the circumstances shall require it.

For any work or labour properly performed, and not herein provided for, such allowances are to be made as heretofore.

*** For REGULÆ GENERALES, pursuant to 28 Vict. c. 45, *See* Law Rep. 1 Q. B. 725.

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BANKRUPTCY—*Proof—Equitable Plea.*] It is not a good equitable plea in bar to an action, that the defendant has been adjudicated bankrupt, and that the plaintiff has proved his cause of action under the bankruptcy.
SPENCER AND HEWITT *v.* DEMETT 123

2. ————, proceedings in, before registrar in gaol are judicial, and in a public court 296
See DEFAMATION.

3. ————, effect of, on right of action for false representation .. 313
See PARTIES TO ACTION. 1.

4. ————: *See* BANKRUPTCY ACT, 1861.

BANKRUPTCY ACT, 1861 (24 & 25 Vict. c. 134)—*Composition Deed—Unreasonable Provisions.*] In a trust deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 104), a provision, which makes the composition payable on the trustees' certificate that the deed has been assented to by the statutory number of creditors, is unreasonable.
BOULNOIS AND ANOTHER *v.* MANN 28

2. ————————, *Composition Deed—Registration.*] A composition deed under the Bankruptcy Act, 1861, so far as its operation depends on the act, takes effect, for all purposes, from the date of registration, not of execution:—*Held*, therefore, that rent, which accrued due from the insolvent to the defendant after the execution

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but before the registration of a trust deed, might be set off in an action, brought against the defendant by the trustees for a debt due from him to the insolvent:—*Held*, also, that the proportion of rent which, under s. 150 of the Bankruptcy Act, 1861, would be provable in bankruptcy, may be set off as a mutual credit, under s. 171 of 12 & 13 Vict. c. 106, in an action brought against the landlord by assignees in bankruptcy or trustees of a composition deed.

Semble, by Bramwell, B., that the liability to the rent was a liability to pay money on a contingency within s. 178 of 12 & 13 Vict. c. 106, and as such a subject of set-off.

STANGER *v.* MILLER 58

3. BANKRUPTCY ACT, 1861—*Deed of Arrangement—"Value" of Creditors—Secured and Unsecured Creditors.*] Section 192 of the Bankruptcy Act, 1861, requires that a deed of arrangement between a debtor and his creditors shall, in order to bind non-assenting creditors, be assented to or approved of in writing by a majority in number, representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to 10*l.* and upwards:—*Held* (affirming the judgment of the Court below), that, in determining whether the requisite majority in value of the creditors have assented to the deed, the value of securities held by secured creditors is not to be deducted.

WHITTAKER *v.* LOWE .. .. EX. CH. 74

4. ——————————, *Deed under section* 192—*Unreasonable Conditions—Reservation of Rights against Sureties—Release—Delivery of Possession.*] A deed under s. 192 of the Bankruptcy Act, 1861, is valid, 1. although it unconditionally releases the debtor, in consideration only of a covenant to pay a composition partly secured by suretyship, and of the assignment of property next mentioned; 2. although it contains an assignment of the debtor's property, coupled with a condition that the debtor shall remain in possession with the power of disposing of the property, until default is made in payment of the composition; 3. although it has no clause reserving rights against sureties, unless it is shewn that there are creditors secured by sureties.

JOHNSON *v.* BARRATT 65

5. ——————————, *Execution Creditor—Bankruptcy Consolidation Act* (12 *&* 13 *Vict. c.* 106), *s.* 184—*Interpleader Act* (1 *Wm.* 4, *c.* 58).] Where an execution is levied by seizure, but the sale is suspended by an interpleader order, and before sale a petition for adjudication of bankruptcy is filed against the execution debtor, on which he is afterwards adjudged bankrupt, the case is within the Bankruptcy Consolidation Act (12 & 13 Vict. c. 106), s. 184, and the execution creditor is deprived of the benefit of his execution.

O'BRIEN *v.* BRODIE 302

6. ——————————, *Deed under s.* 192—*Reasonableness—Verification of Debts under Penalty—Forfeiture of Debt.*] A deed under the Bankruptcy Act, 1861, s. 192, absolutely releasing the debtor, empowered the trustees to require any creditor to verify his debt by solemn declaration; and provided that, in the event of any creditor, if in Great Britain or Ireland, failing to verify his debt for two calendar months after such requisition, he should lose all benefit under the deed, and his dividends should fall into the general estate for the benefit of creditors not making similar default:—*Held*, that the provision as to forfeiture was unreasonable, and the deed therefore bad.

GIDDINGS AND ANOTHER *v.* PENNING 325

7. ——————————, *Composition Deed—Covenant with all the Creditors—Release.*] In a composition deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor of the one part, and

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all his creditors of the other part, the debtor covenanted severally with all his creditors to pay a certain composition:—*Held*, that any creditor could sue on this covenant.

The deed, in consideration of the above covenant, released the debtor from all actions, debts, contracts, &c.:—*Held*, that the general words of the release were to be restrained by the general provisions of the deed, and the deed was held valid.

GRESTY *v.* GIBSON 112

8. BANKRUPTCY ACT, 1861—*Deed under s.* 192—*Unreasonable Provisions—Construction, "Creditors."*] The word "creditor" in the Bankruptcy Act, 1861, means any person who could have proved against the debtor's estate in bankruptcy. *More* v. *Underhill* (4 B. & S. 566) overruled. An inspectorship deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor, inspectors, and all persons then creditors of the debtor, or who would be entitled to prove against his estate in bankruptcy, (cl. 9.) provided for payment of dividends to all such creditors and persons entitled to prove, (cl. 14, 16) allowed creditors to assent for part only of their debt, specifying what part, (cl. 19) allowed the inspectors to set apart dividends for non-assenting creditors and unascertained debts, (cl. 23) gave to the certificate of the inspectors the effect of a discharge in bankruptcy, (cl. 30) provided that if not valid under the act it should bind executing and assenting creditors, (cl. 31) provided that it might be pleaded in bar with the same effect as an order of discharge under the Bankruptcy Act, 1861, and (cl. 32) that anything contained in it contrary to the bankrupt law should be treated as expunged:—*Held* (affirming the judgment of the Court below), that the deed was valid under 24 & 25 Vict. c. 134, s. 192.

WOOD *v.* DE MATTOS .. .. Ex. Ch. 91

9. ———————————, *Bankruptcy—Deed of Arrangement—Assenting and Non-assenting Creditors—Inequality.*] To an action on a bill of exchange the defendants pleaded a composition deed, entered into between themselves, a trustee, and the several persons whose names were set forth in the schedule to the deed annexed, whereby it was provided that the scheduled creditors should each receive three promissory notes payable at different dates, to secure the payment of the composition agreed on, and that the trustee should receive and hold similar promissory notes to be handed upon demand to non-assenting creditors, amongst whom were the plaintiffs. There was no provision requiring a tender of these notes to be made to non-assenting creditors:—*Held*, that although there was some practical inequality in the position of the creditors named in the schedule, and of the non-assenting creditors, there was no such inequality as vitiated the deed.

BLUMBERG AND ANOTHER *v.* ROSE AND ANOTHER 232

10. ———————————, *Trust Deed for benefit of Creditors—Registration.*] Section 197 of the Bankruptcy Act, 1861, applies only to deeds registered under ss. 192, 193, and not to deeds registered under s. 194. *Ex parte Morgan* (32 L. J. (Bkr.) 15) followed.

PEARSON *v.* PEARSON 308

BAPTISM, certificate of, admissible in evidence without proof of identity of person mentioned therein 255

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BIBLE, entries in, of pedigree, when admissible in evidence 255

See EVIDENCE. 1.

BILL OF SALE—*Affidavit—Description of Grantor's occupation and residence—"Best of the belief" of Deponent*—17 & 18 *Vict. c.* 36

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(*Bills of Sale Act*, 1854), s. 1.] An affidavit annexed to a bill of sale described the grantor's residence and occupation to the "best of the belief" of the deponent:—*Held*, a sufficient description to satisfy the requirements of 17 & 18 Vict. c. 36, s. 1.
ROE *v.* BRADSHAW 106

BILLS OF SALE ACT, 1854, form of affidavit under 106
See BILL OF SALE.

BIRTH, certificate of, admissible in evidence without proof of identity of person mentioned therein 255
See EVIDENCE. 1.

BOND given to trustees of Industrial Society, effect of certificate of registration upon 1
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———— OF BIRTH, DEATH, &c., admissible in evidence without proof of identity of persons mentioned in it 255
See EVIDENCE. 1.

CHARGING ORDER under 1 & 2 Vict. c. 110, s. 14—*Trust in Shares in a Company limited under* 25 *&* 26 *Vict. c.* 89.] The plaintiff having obtained a charging order under 1 & 2 Vict. c. 110, s. 14, on shares standing in the name of the defendant in a company, limited, the Court refused an application to rescind the order made by the defendant on the ground that the shares were held by him in trust for a third person.
CRAGG *v.* TAYLOR 148

CHOSE IN ACTION, meaning of 1
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————————, effect of certificate of registration under 25 & 26 Vict. c. 87 upon 1
See INDUSTRIAL AND PROVIDENT SOCIETY.

COMMON—*Cattle, levant and couchant—Extinguishment—Change in condition of Dominant Tenement.*] A right of common appurtenant for cattle *levant* and *couchant*, proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now, and for more than thirty years past, turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle.
CARR *v.* LAMBERT AND OTHERS 168

COMMON INFORMER suing for penalty must bring his action within one year 152
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COMMON LAW PROCEDURE ACT, 1852, s. 51, interrogatories under 6, 102, 354
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See INJUNCTION. 1.

———————————, 1860, s. 12, interpleader .. 261
See INTERPLEADER.

COMPANY—*Allotment of Shares—Reasonable Time.*] The defendant in an action for non-acceptance of shares, applied for shares on June 8, but no allotment was made till Nov. 23. On Nov. 8, he withdrew his application. The facts in a similar action were the same, except that the defendant had never withdrawn his application:—*Held*, that the allotment must be made within a reasonable time, that it was not so made, and, therefore, that neither defendant was bound to accept the shares allotted.
RAMSGATE VICTORIA HOTEL COMPANY, LIMITED *v.* MONTEFIORE.
SAME *v.* GOLDSMID 109

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COMPOSITION DEED: *See* BANKRUPTCY ACT, 1861.

CONCURRENT JURISDICTION of County Court 133
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CONDITIONS, unreasonable, in deed under s. 192 of the Bankruptcy Act, 1861 28
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CONSTRUCTION, "costs to be taxed by a master of a superior court of law at Westminster," meaning of 54
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———————— of will 46, 125, 235, 331
MEANING OF WORD "APPURTENANCES": *See* WILL. 2.

CONTINGENCY, liability to pay money on, within s. 178 of 12 & 13 Vict. c. 106 58
See BANKRUPTCY ACT, 1861. 2.

CONTRACT—*Void for Immorality.*] One who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral purpose, cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act. The defendant, a prostitute, was sued by the plaintiffs, coachbuilders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that they knew her to be a prostitute, and supplied the

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brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men :—*Held*, that the plaintiffs could not recover.

PEARCE AND ANOTHER *v.* BROOKS 213

2. CONTRACT—*Illegality—Wager—Horse Race—Contribution to Prize—8 & 9 Vict. c.* 109, *s.* 18.] The plaintiff and defendant agreed to ride a race each on his own horse, both the horses ridden to become the property of the winner :—*Held*, that the horses could not be regarded as a contribution toward a prize within the meaning of the proviso in 8 & 9 Vict. c. 109, s. 18, and that the contract was therefore void under that section, as being "by way of gaming or wagering."

COOMBES *v.* DIBBLE 248

3. ————, effect of parol variation of 117

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4. ————, measure of damages upon breach of 177

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5. ————, made after death of intestate, administrator cannot sue on, in representative character 222

See ADMINISTRATION.

CONTRACT OF SALE, form of 316

See FRAUDS, STATUTE OF. 2.

CONVERSION, interrogatories as to plaintiff's title in action for, not allowed 6

See INTERROGATORIES. 1.

COPYHOLD—*Easement—Support—Negligence.*] The owner of freehold land and copyhold land adjacent to each other sold the copyhold land, and by a deed of even date with the surrender the purchaser covenanted and granted that the vendor, his heirs, &c., might work in the adjoining freehold land, without being liable to make compensation for any injury caused by such working to certain buildings, authorized by the deed to be erected on the copyhold land, and that the purchaser, his heirs, &c., would indemnify the vendor, his heirs, &c., against any claims for such damage. This deed was not entered on the court rolls, nor referred to in the surrender. The copyhold land was afterwards conveyed enfranchised by the purchaser and the lords of the manor to the Church Building Commissioners, under whom the plaintiff took. Neither the lords of the manor, nor the commissioners, nor the plaintiff, had notice of the deed. The defendant, who took the adjoining freehold land under the original vendor, having by working the mines in it caused the land of the plaintiff to sink, and damaged the buildings thereon :—*Held*, that he was not protected by the above-mentioned deed from liability to make compensation to the plaintiff.

Semble (per Martin, Channell, and Pigott, BB.; Pollock, C.B., dissentiente), that if both lands had been freehold the defendant would still have been liable.

RICHARDS *v.* HARPER 199

COSTS—*Concurrent Jurisdiction—Dwelling-place—County Court—9 & 10 Vict. c.* 95, *s.* 128.] A person who has no permanent place of abode "dwells," within the meaning of 9 & 10 Vict. c. 95, s. 128, at the place at which he may be *temporarily* residing.

ALEXANDER AND ANOTHER *v.* JONES 133

2. ——, *Taxation of—Officers of Court.*] In a private act, constituting a body of commissioners for settling claims against a company, it was provided that they might give certificates for costs, and that in case of difference such costs should, on the application of either party, be

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"taxed and settled by a master of a superior court of law at Westminster," according to the rules, and on payment of the fees observed and paid in actions at law, and that, on production of the certificate, judgment for the amount might be entered up and execution issued thereon. A master of this court having taxed costs accordingly:—*Held*, that, under this provision, the masters taxed as *personæ designatæ*, and not as officers of the court, and that the Court had no jurisdiction to review their taxation.
IN RE THE SHEFFIELD WATERWORKS ACT, 1864. COLLIS' CLAIM. WRAITHBY'S CLAIM 54

3. COSTS in error, practice as to 41
See PRACTICE. 5.

COUNTY COURT, concurrent jurisdiction of 133
See COSTS.

COVENANT—*Nullity of Marriage—Impotence.*] To an action on a covenant made by the defendant in consideration of his daughter's marriage, the defendant pleaded that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any court, or that either of the parties had elected to treat it as void:—*Held*, a bad plea.
CAVELL AND ANOTHER *v.* PRINCE 246

2. ———— with all creditors in deed under s. 192 of Bankruptcy Act, 1861, effect of 112
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3. ———— to teach in indenture of apprenticeship, effect of 244
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————, effect of covenant with all, in deed under s. 192 of Bankruptcy Act, 1861 112
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CUSTOM, effect of, in giving force to a secret limit of authority of agent 320
See PRINCIPAL AND AGENT. 2.

DAMAGES—*Measure of, for breach of Contract—Remoteness.*] The defendants having contracted with the plaintiff to receive his ship into their dock at a specified time, and having given him notice that they could then receive her, she was brought to the dock in ballast upon a stormy day, under the charge of her captain and a pilot. Owing to the breaking of one of the chains of the dock-gates, the defendants were unable to let her in. The captain, after consultation with the pilot as to the best course to be pursued, anchored the ship outside the gates. At the turn of the tide she grounded on a sandbank and broke her back. The plaintiff having brought an action against the defendants for the damage done to the ship, two questions were put to the jury upon the trial: first, was it possible to have taken the ship to a place of safety; and secondly, if so, was it the captain's or the pilot's fault that she was not taken there? On the first question the jury were unable to agree, and in reply to the second, found that neither the captain nor the pilot had been guilty of negligence. The judge thereupon directed a verdict for the plaintiff, with leave to enter it for the defendant, the Court to draw inferences of fact consistent with the finding of the jury:—*Held*, by Pollock, C.B., Channell and Pigott, BB., that the finding of the jury was not sufficient to enable the Court to draw any conclusion as

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to whether or not the loss was occasioned under circumstances rendering the defendants liable for the damage to the ship, as the consequence of their breach of contract, within the rule laid down in *Hadley* v. *Baxendale* (9 Ex. 341; 23 L. J. (Ex.) 179), and that there must be a new trial. *Held*, by Martin, B., that, on the facts and finding of the jury, the damage done to the ship might be fairly and reasonably considered as the consequence of the defendants' breach of contract.
WILSON *v.* THE NEWPORT DOCK COMPANY 177

DAMAGES, interrogatories by defendant to ascertain amount of, not allowed, when 102
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DEED under s. 192 of Bankruptcy Act, 1861: *See* BANKRUPTCY ACT, 1861.

DEFAMATION—*Privileged Communication—Protection to Report of Judicial Proceedings—Public Court—Registrar in Bankruptcy—Examination of Bankrupt in Gaol*—24 & 25 *Vict. c.* 134, *ss.* 101, 102.] Proceedings held in gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, ss. 101, 102, upon the examination of a debtor in custody, are judicial and in a public court. A fair report, therefore, of those proceedings is protected.
RYALLS *v.* LEADER AND OTHERS 296

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DIVISIBILITY OF CLAIM. Where agent underwrote a policy to an amount in excess of his authority:—*Held*, that no action lay to recover from the principal the amount for which the agent had power to underwrite 320
See PRINCIPAL AND AGENT. 2.

DUCHY OF CORNWALL, prerogative of duke as to venue 381
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ERROR, costs in, under Common Law Procedure Act, 1852 41
See PRACTICE. 5.

EVIDENCE—*Pedigree—Family Bible—Certificates—Power—Wills Act* (1 *Vict. c.* 26), *s.* 10.] The provision of the Wills Act (1 Vict. c. 26), s. 10, making good the execution of powers by will, if executed as provided by the act with respect to wills, relates to powers created since, as well as to powers created before, the act. Entries of pedigree in a family bible or testament, which is produced from the proper custody, are admissible as evidence, without proof of their handwriting or authorship. Certificates of births, baptisms, marriages, or deaths, are admissible as evidence, without proof of the identity of the persons mentioned in them with the persons as to whom the fact recorded by them is sought to be established.
HUBBARD *v.* LEES AND PURDEN 255

2. ———, possession of land 259
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EXAMINATION of bankrupt in gaol before registrar is a judicial proceeding, and in a public court 296
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FAMILY BIBLE, entries of pedigree in, when admissible in evidence .. 255
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FEE SIMPLE, devise of, without words of limitation 235
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FRAUDS, STATUTE OF—*Agreement—Proposal in Writing—Parol Acceptance.*] A proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds. *Warner* v. *Willington* (3 Drew. 523); *Smith* v. *Neale* (2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143), confirmed.
REUSS AND ANOTHER *v.* PICKSLEY AND ANOTHER .. Ex. Ch. 342

2. ———, *Contract of Sale—Names of Parties.*] In order to make a valid note or memorandum of a contract for the sale of goods within the Statute of Frauds, s. 17, the names of the parties to the contract must appear upon the document as such parties. A., the purchaser from B. of goods above the value of 10*l.*, signed a document in the fol-

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lowing terms:—"A. agrees to buy the whole of the lots of marble purchased by B., now lying at Lyme Cobb, at 1s. per foot":—*Held*, that B.'s name not being mentioned as seller, the document was not a note or memorandum of the contract within the Statute of Frauds, s. 17.

VANDENBERG *v.* SPOONER 316

3. FRAUDS, STATUTE OF—29 *Car.* 2, *c.* 3—*Parol Variation of Written Contract—Substituted Contract—Rescission.*] The plaintiff made a contract in writing, with the defendant, for the sale of certain goods of more than 10*l.* in value, at specified prices, to be delivered within a specified time. Subsequently and before the time for delivery had arrived, a parol agreement between the parties was entered into, whereby the time for delivery was extended:—*Held*, that the subsequent parol agreement was not "good" for any purpose under 29 Car. 2, c. 3, s. 17, and could not operate either as a rescission of the original written contract, or as a new contract for the sale of goods, and that the original written contract might therefore be enforced. *Moore* v. *Campbell* (10 Ex. 323) followed.

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INDEPENDENT COVENANTS, in indenture of apprenticeship, construction of 244
See APPRENTICE.

INDUSTRIAL AND PROVIDENT SOCIETY—15 *&* 16 *Vict. c.* 31, *and* 25 *&* 26 *Vict. c.* 87, *s.* 6—"*Property*"—*Chose in Action.*] The 6th section of the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), provides that "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society":—*Held*, that a bond given to trustees for an industrial society, registered under 15 & 16 Vict. c. 31, was, by the certificate of registration under 25 & 26 Vict. c. 87, vested in the society; and that the society could sue on it for breaches of the condition subsequent to the registration.

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INJUNCTION—*Railway Company—Inequality of Charge for "Packed Parcels"—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 79, 82.] The plaintiff, a "packed parcel" carrier, having been charged by the defendants, and having paid to them under protest, a sum for the carriage of his packed parcels beyond the sum charged by them to certain wholesale houses for the carriage of goods of a similar description, brought an action against them to recover the amount of the overcharge, and obtained a verdict, which was afterwards upheld in the Exchequer Chamber, upon argument of a bill of exceptions. The defendants continued, however, to make the same charges, and to receive the same sums of money from the plaintiff for the carriage of his goods, as before, and he therefore issued a fresh writ to recover the money paid by him during another and more recent interval of time. After issuing the writ, he applied, under the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 79, 82, for an injunction to restrain the defendants from charging him for the carriage of his goods "otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances":—*Held*, that the case was not one in which the Court would exercise their statutory power to grant an injunction.
SUTTON *v.* THE SOUTH EASTERN RAILWAY COMPANY 32

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INSURANCE: *See* MARINE INSURANCE.

INTERPLEADER—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 12.] A. sued the defendants, to whom he had entrusted a policy for certain specified purposes, and declared in trover and detinue, and specially on the contract. B., who had pledged the policy with A., then brought an action against the same defendants for the recovery of the policy. An interpleader order was made, directing that the proceedings in the first action should be stayed till further order, that A. should be at liberty to defend the second action, indemnifying the defendants, and that B. should give the defendants security for costs:—*Held*, that the order was rightly made. *Best* v. *Hayes* (1 H. & C. 718) followed.
TANNER *v.* EUROPEAN BANK, LIMITED. BOWEN *v.* SAME .. 261

———— ORDER, where sale under execution stopped by, effect of 302
See BANKRUPTCY ACT, 1861. 5.

INTERROGATORIES—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 51—*Discovery of Plaintiff's Title.*] The rule allowing, in cases of ejectment, interrogatories inquiring into the plaintiff's title, will not be extended to other actions. In an action of trover for cotton, the defendant interrogated the plaintiff how and when he first became possessed of the cotton, and when and in whose hands it was when he first became possessed of it. This interrogatory was disallowed. He also interrogated the plaintiff as to his dealings with the person from whom the defendant had obtained the cotton, but did not shew by his affidavit that any such dealings had taken place, or that he had made any inquiries of that person. This was also disallowed.
FINNEY *v.* FORWOOD AND OTHERS 6

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2. INTERROGATORIES, *Practice—Tendency to Criminate—Bona fides.*] In an action against D. and B., as attorneys and solicitors, for not investing in a proper manner certain moneys entrusted to them by the plaintiff, the plaintiff proposed to administer interrogatories to B., with a view of shewing that there was a partnership between him and the other defendant in the business of attorneys and solicitors. B. objected to the interrogatories on the ground that he had never been admitted as an attorney or solicitor, and that they might therefore tend to criminate him and expose him to an indictment under 6 & 7 Vict. c. 73, s. 2, for the misdemeanour of practising without a certificate. The interrogatories were allowed, the Court considering that they were bonâ fide put to aid the action. *Baker* v. *Lane* (3 H. & C. 544) modified and explained.
BICKFORD *v.* DARCY AND BEACHEY 354

3. ———————, in action for breach of contract to ascertain amount of damage suffered by plaintiff, not allowed 102
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LAND, duty of owner of, to keep water collected by him on his own ground 265
See NEGLIGENCE. 2.

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See LANDLORD AND TENANT. 1.

LANDLORD AND TENANT—*Ejectment—Possession—Evidence.*] One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire, as against his landlord, a prescriptive title to the land first occupied by him.
DIXON *v.* BATY AND ANOTHER 259

2. ———————, *Tenancy continued by Remainder-man—Implied Term.*] Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise, is a question of fact. If such a tenant continues to hold under the remainder-man, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, nor is according to the custom of the country.
OAKLEY *v.* MONCK .. .. Ex. Ch. 159

LAND TAX—*Exemption—Hospital—Construction—38 Geo. 3, c. 5, s. 25.*] In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1), is contained an exemption from land tax of "any hospital," in respect of its site. Commissioners, appointed by the Crown to administer a fund subscribed by the public for that purpose, founded, in 1857, an asylum for the maintenance and education of three hundred daughters of soldiers, sailors, and marines, dying in active service. The asylum was built and maintained entirely out of that fund, and solely for the benefit of the children, and was under the control of the commis-

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sioners:—*Held*, first, that the asylum was not within the exemption in the act. Secondly, that it was not exempt as Crown property. The exemption in the act only applies to institutions existing at the time when the tax was made perpetual. Land previously chargeable with land tax is not exempted by becoming Crown property.

Semble, that such an institution is a hospital, within the meaning of that word in 38 Geo. 3, c. 5, s. 25, and, if existing at the time when the act was passed, would have been within the exemption.

Semble, that an institution so founded, maintained, and governed, is not Crown property.

LORD COLCHESTER AND OTHERS *v.* KEWNEY 368

LESSEE: *See* LANDLORD AND TENANT.

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See NEGLIGENCE. 3, 4.

LIBEL: *See* DEFAMATION.

LIMITATION OF ACTIONS, action by common informer for penalty 152
See PENAL ACTION.

LIMITATIONS, STATUTE OF—*Debtor and Creditor*—9 *Geo.* 4, *c.* 14, *s.* 1—*Acknowledgment.*] The defendant being indebted to the plaintiff wrote to the plaintiff, before the debt was barred by the Statute of Limitations, a letter containing these words, "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week":—*Held*, by Bramwell and Channell, BB. (Martin, B., dissenting), a sufficient acknowledgment in writing within 9 Geo. c. 14, s. 1.

LEE *v.* WILMOT 364

MARINE INSURANCE—*Ship and Shipping—Marine Policy—Construction—"At and from."*] In a homeward policy the words "*at and from*" a port named are to be construed in their natural geographical sense, without reference to the expiration of an outward policy "to" the same place, and therefore the policy attaches as soon as the vessel arrives within the port named, and although not *safely moored*. A vessel insured "*at and from*" Havana was injured by coming in contact with an anchor, after entering the harbour, and whilst passing over a shoal up to her place of discharge:—*Held*, that the policy had attached.

HAUGHTON AND OTHERS *v.* EMPIRE MARINE INSURANCE COMPANY (LIMITED) 206

2. ——————, *Atlantic Cable—Policy on Adventure.*] The plaintiff caused himself to be insured with the defendant in a policy which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words:—"At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted each way . . . . the ship, &c., goods, &c., shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, at 10*l.* per share:" and written opposite to the clause "touching the adventures, &c.," the words: "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency

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attending the conveyance and successful laying of the cable." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved:—*Held*, that the policy was "on the adventure" and not on the cable merely; and that the adventure, that is, "the successful laying down of the cable in one continuous length between Ireland and Newfoundland," having wholly failed, the plaintiff was entitled to recover as for a total loss.

WILSON *v.* JONES 193

3. MARINE INSURANCE, liability of principal for acts of his agent in underwriting a policy to an amount in excess of his authority .. 320
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MEASURE OF DAMAGES: *See* DAMAGES.

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NAME of both parties must appear in agreement under Statute of Frauds 316
See FRAUDS, STATUTE OF. 2.

NEGLIGENCE—*Dangerous Instrument—Public Place.*] The defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed:—*Held*, that the plaintiff could not maintain any action for the injury.

MANGAN *v.* ATTERTON 239

2. ————, *Trespass—Duty of Owner of Land—Water.*] One, who for his own purposes brings upon his land, and collects and keeps there anything likely to do mischief, if it escapes is primâ facie answerable for all the damage which is the natural consequence of its escape. The defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed by the underground communication into the plaintiff's mines:—*Held*, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused.

FLETCHER *v.* RYLANDS AND ANOTHER .. .. Ex. Ch. 265

3. ————, *Railway—Level Crossing.*] There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level; but it depends upon the circumstances of each case

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whether the omission of such a precaution amounts to negligence on the part of the company. A railway was crossed by a public footway on a level, and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but on the level of the line it could be seen for 300 yards each way. A woman approaching the line by that gate was detained by a luggage train on her side, and immediately on its having passed, crossed the line, and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains:—*Held*, that there was no evidence of negligence on the part of the company, but that there was evidence of negligence on the part of the deceased. *Bilbee v. The London, Brighton, and South Coast Railway Company* (18 C. B. (N.S.) 584) considered.

STUBLEY *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY 13

4. NEGLIGENCE—*Railway Company—Level Crossings—Injury to Foot-passenger—Absence of Protection for Carriage Traffic.*] The defendants' railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way, and a turnstile for the use of foot-passengers. S., a foot-passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of defendants' trains. At the time of the accident, contrary to the provisions, by statute and by the defendants' rules, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gatekeeper present to take charge of them; although no traffic was passing across, and although a train was overdue. In an action against the defendants by the executors of S.:—*Held*, that there was, under the circumstances, evidence of negligence on the part of the defendants to go to the jury, inasmuch as by neglecting the required precautions for the safety of carriage-traffic the defendants might be considered to have intimated that their line might safely be traversed by foot-passengers. *Bilbee* v. *The London, Brighton, and South Coast Railway Company* (18 C. B. (N.S.) 584) followed.

STAPLEY AND ANOTHER, EXECUTORS *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY 21

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See PRACTICE. 1.

NUISANCE—*Abatement by entering Land of a third Party—Balance of injury—Watercourse—Right to obstruct.*] The plaintiffs, by parol licence from L. and from the defendant, constructed a watercourse, and thereby discharged the water from their own mines across the land of L., and thence across the land of defendant. The defendant, having revoked his licence, upon the plaintiffs' refusal to discontinue using the watercourse, entered upon the land of L., at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. The defendant by stopping the watercourse on his own land would have done less damage to the plaintiffs than was actually done, but more damage to L., and possibly some damage to the public:—*Held* (affirming the judgment of the Court below), that the watercourse was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after revocation of the licence were wrong-doers, was subordinate to the convenience of innocent third persons and of the public.

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PARCELS, inequality of charges for packed, by railway 32
See INJUNCTION. 1.

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See FRAUDS, STATUTE OF. 2.

PARTIES TO ACTIONS—*Bankruptcy—Action for False Representation—Pecuniary Loss—Special Damage—Primary cause of Action.*] To a declaration for a false representation, whereby the plaintiff was induced to pay 2000*l.*, and "sustained great loss, and became and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant, except as to the claim in respect of the adjudication in bankruptcy and the remainder of the personal damage alleged, pleaded that before action the plaintiff had been adjudicated bankrupt, that the loss sustained was a pecuniary loss, and that the right to sue for it passed to his assignees:—*Held*, that the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignees, and therefore that the plea was a good answer to the whole declaration, and might have been so pleaded.
HODGSON *v.* SIDNEY 313

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PASSENGER, injury to, on foot, going over level crossing of railway .. 13, 21
See NEGLIGENCE. 3, 4.

PEDIGREE, entries of, in family bible, admissible in evidence, when .. 255
See EVIDENCE. 1.

PENAL ACTION—*Common Informer—Limitation*—31 *Eliz. c.* 5, *s.* 5.] The 31 Eliz. c. 5, s. 5, applies to every class of actions on statutes imposing penalties, and a person suing for a penalty for himself alone, must therefore bring his action within a year after the offence is committed, in the same manner as though he sued as an informer *qui tam*. *Lookup* v. *Frederick* (4 Burr. 2018) followed. *Chance* v. *Adams* (1 Lord Raym. 77) questioned.
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PRACTICE—*Death of Plaintiff between Verdict and Judgment—New Trial—Stay of Proceedings*—17 *Car.* 2, *c.* 8, *s.* 1—15 & 16 *Vict. c.* 76 (*C. L. P. Act*, 1852) *s.* 139.] An action for negligence was brought by the plaintiff, a child of seven years old, by his next friend, to recover damages for injuries done to him by the horse of the defendant. The jury found a verdict for 150*l*. Nine days after the trial the child died. Judgment was afterwards signed by the next friend. An application to stay proceedings, or for a new trial, was then made on the ground of the death of the plaintiff since the trial:—*Held*, first, that although the damages were presumably given on the supposition that the child would continue to live, the case was not one in which the Court would grant a new trial; secondly, that the death of an infant plaintiff in an action for negligence between verdict and the signing of judgment was no ground for a stay of proceedings, if judgment had been signed within the time specified in 17 Car. 2, c. 8, s. 1, and the Common Law Procedure Act, 1852, s. 139. *Palmer* v. *Cohen* (2 B. & Ad. 966) followed.
KRAMER *v.* WAYMARK 241

2. ————, *Venue-Prerogative—Duchy of Cornwall.*] An information was filed by the Attorney General to the Prince of Wales, to recover dues payable in Devon to the Prince, as Duke of Cornwall, and the venue was laid in Middlesex. On an application by the defendant to change the venue to Devon, it appeared that all the witnesses to facts resided there; but that, as the defendant disputed that the dues were payable to the Prince in right of the Duchy, the records of the office of the Duchy in London would have to be produced at the trial. The Court, on the above facts, and on the ground that the Crown would have a right to allege an interest in the suit, and to claim a trial at bar, refused the application:—
Semble, that such a suit is in the nature of a transitory action, and that the Crown filing the information, would be entitled to lay and keep the venue where it pleased.
Semble, also, that the Prince of Wales, suing as Duke of Cornwall, would have the same right.
ATTORNEY GENERAL TO THE PRINCE OF WALES *v.* CROSSMAN .. 381

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3. PRACTICE—*Interrogatories—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125) *s.* 51.] In an action for a breach of contract, whereby the plaintiff's patent became void, laying as damages loss of profits, the defendant paid money into court, and applied for leave to deliver interrogatories directed to ascertain the probable value of the patent. The application was refused. *Wright* v. *Goodlake* (34 L. J. (Ex.) 82) commented on.
JOURDAIN *v.* PALMER 102

4. ————, *Pleading—Injunction*—17 & 18 *Vict. c.* 125.] A claim of a writ of injunction cannot be pleaded to.
BOOTH *v.* TAYLOR 51

5. ————, *Costs—Error—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76).] The legal representative of a plaintiff in error (the plaintiff below), coming in by suggestion after the commencement of the proceedings in error, and carrying them on to judgment, under s. 163 of the Common Law Procedure Act, 1852, is not, on affirmance of the judgment below, liable to the payment of the costs of the defendant in the court below. The Common Law Procedure Act, 1852, imposes no new liability to the payment of costs.
PARKER *v.* TOOTAL 41, 115

6. ————, *Writ for Service out of the Jurisdiction under s.* 18 *of the Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76).] A writ having been issued for service out of the jurisdiction under 15 & 16 Vict. c. 76, s. 18, the defendant applied on affidavit to set it aside, on the ground that the cause of action did not arise within the jurisdiction; and the Court not being satisfied that the plaintiff did not intend to sue for matters not arising within the jurisdiction, made an order to set aside the writ, unless the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction and to confine himself to that cause of action.
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See PRACTICE. 2.

PRINCIPAL AND AGENT—*Debtor and Creditor—Inspectorship Deed under the Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192.] A trader carrying on business as C. J. M. & Co., ordered goods of the plaintiff, and before their delivery executed an inspectorship deed, of which the defendants were inspectors. The plaintiff afterwards wrote a note, addressed to the debtor, informing him that the goods were ready for delivery, and the defendants replied, requesting him to send the goods, and signing "*for* C. J. M. & Co." The plaintiff sent the goods, and default being made in payment, sued the defendants for the price. The inspectorship deed gave the debtor licence to carry on his

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business for six months under the control of the inspectors, who had power to put an end to the deed. The inspectors were to receive all the proceeds, pay current expenses (including salaries, rent, and plant, and materials for the purposes of the business), and out of the surplus pay dividends to the creditors. They took no share of the profits, and had no power to take the management of the business to the exclusion of the debtor:—*Held*, that the defendants having expressly signed the order "*for* C. J. M. & Co." they could only be liable as the real principals for the time being; that the deed did not constitute them the masters or real principals of the debtor in carrying on the business; and that, consequently on the above facts, there was no evidence to go to the jury of their liability. The plaintiff could only look for payment to the firm of "C. J. M. & Co.," and to the trust in the deed for the payment of current expenses.

REDPATH *v.* WIGG AND ANOTHER .. .. .. Ex. Ch. 335

2. ——————————, *Extent of Authority—Secret Limit—Underwriter—Marine Insurance—Custom at Liverpool—Divisibility of Claim.*] The defendant authorized an insurance broker at Liverpool to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed 100*l.* by any one vessel. The broker, acting in excess of this authority, and without the knowledge of the defendant, underwrote a policy for the plaintiff for 150*l.* The plaintiff was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that in nearly all cases there is a limit of some sort, which remains undisclosed to third persons, imposed on brokers by their principals. In an action upon the policy:—*Held*, first, that the defendant was not liable for the whole amount underwritten, the broker having exceeded his authority; and, secondly, that the contract whereon the action was founded was not capable of division, and therefore that the defendant was not liable to the extent of 100*l.*

BAINES AND ANOTHER *v.* EWING 320

PRIVATE ACT OF PARLIAMENT—*Agreement in derogation of it—Equitable Pleading.*] A clause in a private act of parliament, in terms imposing a duty not relating to the public interest, does not invalidate a previous agreement not to exact its performance, made in view of the passing of the act by the person to whom the duty would otherwise, by the terms of the act, be due, with the persons subjected to it, or with other persons on their behalf. The plaintiff had agreed with the promoters of a railway bill, to bear the costs of obtaining and passing it. The bill was passed, and contained the usual clause, directing payment by the company of the costs of obtaining and passing it. To an action for his costs, the company pleaded, equitably, the previous agreement:—*Held*, a good plea.

Semble, that the replication which alleged a rescission of the agreement before breach was bad; but that it would have been good if it had alleged a rescission before work done. An equitable plea makes the subsequent pleadings equitable, though not so pleaded.

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See INDUSTRIAL AND PROVIDENT SOCIETY.

RACE: *See* HORSE RACE.

RAILWAY COMPANY—*Carrier—Inequality of Charge.*] The defendants, a railway company, were incorporated by an act (4 & 5 Wm. 4, c. lxxxviii.), which contained an *equality clause* (s. 158) in the usual terms. The defendants were in the habit of charging to the public on any consignment of goods made to one person, at the same time, though consisting of several distinct parcels, a tonnage rate on the aggregate weight of the whole:—*Held*, that the fact that, of goods so consigned at the same time to one person, and distinctly addressed to him, some articles had also written conspicuously upon them the names of persons to whom the consignee intended to deliver them, did not entitle the defendants to charge separately for those on which such names were different. Therefore the plaintiffs, who were carriers, were held entitled to recover the difference between sums paid under protest on goods so consigned and addressed by them to themselves, but charged for separately on account of such second name appearing on them, and the amount which would have been payable on the aggregate weight of the consignment. The defendants, in addition to their business of carriers by rail, carried on the business of common carriers off their line. They charged an equal rate to all the public for carriage on their line between their termini. They also undertook to collect at one terminus, to carry on their line, and to deliver at a place distinct from, and at some distance beyond, their other terminus; and for this they charged a through rate to all the public alike:—*Held*, that the carriage beyond the second terminus was not auxiliary to their business as railway carriers, but was done by them in their business as common carriers generally, and that the plaintiffs were not entitled to deduct the cost of this carriage, and of collection at the first terminus, from the through rate, and to claim to have their goods carried between the termini for the difference.
BAXENDALE AND OTHERS *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY 137

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SHERIFF—*Special Bailiff—Execution—Writ of fi. fa.*] A debtor, whose goods had been seized under a writ of fi. fa., persuaded the officer executing the writ not to advertise the sale, and himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour, and on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him, and under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods, and they consequently sold at an undervalue: —*Held*, that the above facts did not constitute the officer the agent of the execution debtor, so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale.
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SUCCESSION DUTY—*Power—Construction*—16 & 17 *Vict. c.* 51, *ss.* 2, 4.] For the purpose of taxation under the Succession Duty Act (16 & 17 Vict. c. 51), the appointee under a general power of appointment, which has taken effect on a death happening since the commencement of the act, takes a succession from the donee of the power. Under the will of her husband, who died in 1856, a widow had a life estate in real property, with a general power of appointment by deed or will. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of testator's nephew, and of the children of the nephew by her, on trust for the separate use of the wife. Both the testator's nephew and his wife were strangers in blood to the testator's widow:—*Held*, that under s. 4 of the Succession Duty Act, the nephew's wife took the annuity as a succession from the testator's widow, and not from the testator himself, and that therefore a duty of 10 per cent. was payable.

Semble, per Bramwell, B., that the result would have been the same under s. 2.

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2. ———————, *Expenses of Management incurred by Trustees—Necessary Outgoings—Annual Value*—16 & 17 *Vict. c.* 51, *ss.* 21, 22.] In estimating the value of a succession to lands the legal estate in which is vested by will in trustees, the cestui que trust is not entitled to deduct as "necessary outgoings" reasonable expenses of management incurred, independently of his control, by the trustees acting under an authority given to them by the will. *In re Elwes* (3 H. & N. 719) followed.

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WILL—*Devise—Gift of Fee-simple without Words of Limitation.*] By a will dated before the Wills Act (1 Vict. c. 26), the testator, who had purchased two undivided fourth parts of certain lands, previously held in quarters, devised to J. M., without words of limitation, "all my undivided quarter of three fields," describing them as then on lease for three lives:—*Held*, that the devise carried the fee.
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2. ——, *Construction—Appurtenances.*] The testator was seised in fee of two manufactories at H., one on the east, and the other on the west side of the High Street. The latter was worth one half as much again as the former. They had for the last thirty years been occupied and used together at a single rent as an earthenware manufactory, and they were at the date of the devise and of the testator's death so used and occupied by R. and A. They had formerly, however, been used separately, and with some alterations were capable of being so used again. By his will, the testator devised all his real estate to trustees for sale, and, by a codicil, devised his "messuages, manufactory, &c., on the west side of High Street, in the occupation of R. and A. and others . . . together with all rights, members, and appurtenances to them belonging or appertaining," to A. and W.:—*Held*, that the manufactory on the east side did not pass under the devise to A. and W.
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3. ——, *Construction — Specific Devise — Residuary Clause — General Words.*] By a will prior in date to the Wills Act, 1838, the testator,

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after directing all his debts, &c., to be paid out of his personal estate, proceeded to dispose of his property in these words: "All the rest of my worldly estate, both real and personal, I give, devise, and bequeath as follows:" [then followed two specific devises of certain copyhold premises to Susan W. and the heirs of her body] "and all the rest, residue, and remainder of my personal estate and effects wheresoever and whatsoever, and of what nature, kind, or quality soever the same may be, moneys, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter S. W. to and for her own use absolutely":—*Held*, that the residuary clause did not pass to the devisee the remainder in fee of the copyhold premises specifically devised to her in tail, and that in respect of the reversion of these copyholds there was an intestacy. *Wilce* v. *Wilce* (7 Bing. 664) commented on.
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